CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 581

ADOLPH B. SPRECKELS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1941.

CERTIORARI GRANTED OCTOBER 20, 1941.

No. 9682

United States

Circuit Court of Appeals

For the Ninth Circuit.

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Petition	18
Answer	15
Answer to Amendment to Petition	21
Appearances	1
Application for Leave to File Amendment to Petition	17
Certificate	45
Computation for Entry of Decision, Petitioner's	31
Decision	34
Designation of Portions of the Record, etc., Upon Which Petitioner Intends to Rely	42
Affidavit of Service of	44
Designation of the Parts of the Record to be Printed	46
Docket Entries	2
Findings of Fact and Opinion	22
Notice of Filing Petition for Review	38
Affidavit of Service of	39
Opinion, Findings of Fact and	22

	Page
Petition	4
Amendment to	18
Application for Leave to File Amendment to	17
Petition for Review of Decision by the United States Circuit Court of Appeals for the Ninth Circuit	35
Petitioner's Computation for Entry of Decision	31
Statement of Points on Which Petitioner Intends to Rely	47
Statement of Points to be Relied Upon by Petitioner on Review, etc.	40
Proceedings in U. S. C. C. A., Ninth Circuit	51
Orders of submission	51
Order directing filing of opinion and judgments	52
Opinion, Garrecht, J.	52
Judgment—Case No. 9682	66
Order denying petition for rehearing	67
Order staying issuance of mandate	67
Clerk's certificate	69
Order allowing certiorari	69

Docket No. 95639

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES

For Taxpayer:

HERBERT W. CLARK, Esq.,
LEON de FREMERY, Esq.,
WALTER SLACK, Esq.,

For Comm'r.:

T. M. MATHER, Esq.,
E. M. WOOLF, Esq.

DOCKET ENTRIES

1938

Sep. 26—Petition received and filed. Taxpayer notified. (Fee paid)

" 26—Copy of petition served on General Counsel

Nov. 3—Answer filed by General Counsel.

" 3—Request for Circuit hearing in San Francisco filed by General Counsel.

" 9—Notice issued placing proceeding on San Francisco calendar. Copy of answer and request served.

1939

Mar. 25—Hearing set May 29, 1939 in San Francisco, California.

Jun. 8—Hearing had before Mr. Disney on merits. Submitted. Petitioner moves to amend petition—granted. Motion to consolidate with 94621 granted. Respondent allowed usual time to file amended answer. Application to file an amended petition filed and served on the parties. Briefs due 7/25/39—reply 8/15/39. Called 5/25/39.

" 15—Answer to amended petition filed by General Counsel.

" 27—Transcript of hearing of June 8, 1939 filed.

Jul. 22—Brief filed by General Counsel.

" 24—Brief filed by taxpayer. 7/24/39 copy served.

Aug. 10—Reply brief filed by General Counsel.

1939

Aug. 17—Notice to send all future notices to Walter Slack filed by Herbert W. Clark.

" 25—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 8/28/39 granted.

" 29—Copy of motion and reply brief served on General Counsel.

1940

May 21—Findings of fact and opinion rendered, R. L. Disney, Div. 4. Decision will be entered under Rule 50.

Jun. 19—Computation of deficiency filed by General Counsel.

" 24—Hearing set July 24, 1940 on settlement.

Jul. 3—Computation of deficiency filed by taxpayer. 7/5/40 copy served.

" 24—Hearing had before Mr. Smith on settlement under Rule 50. Respondent concedes petitioner's recomputation correct. Referred to Mr. Disney for decision.

" 31—Transcript of hearing of July 24, 1940 filed.

Aug. 5—Decision entered, R. L. Disney, Div. 4.

Oct. 19—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

" 25—Notice of filing petition for review (affidavit attached) filed by taxpayer. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

1940.
Oct. 25—Statement of points filed by taxpayer with affidavit of service.
" 25—Designation of portions of the record filed by taxpayer. Affidavit of service attached.
[2]

United States Board of Tax Appeals
Docket No. 95639

ADOLPH B. SPRECKELS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:1-JHU:90D), dated July 20, 1938, and as a basis of his proceedings alleges as follows:

1. Petitioner is an individual, with his principal office at 2 Pine Street, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on July 20, 1938. [3]

3. The taxes in controversy are income taxes for the calendar year 1934, and in the amount of $4,904.47.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner erred in increasing the petitioner's distributive share of the income received by the Trustees under the will of Adolph B. Spreckels, deceased, by the amount of $9,431.67. Said error is occasioned by erroneously adjusting the income of said Trustees by the following items:

A. The amount of $39,622.99, erroneously alleged to be taxable dividends received by said Trustees from Monarch Investment Company.

B. The amount of $16,967.02, erroneously disallowed as a deduction for interest paid by said Trustees on an income tax deficiency of the estate of Adolph B. Spreckels, deceased.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1934 the petitioner was a beneficiary of said trust under the will of Adolph B. Spreckels, deceased.

(b) During the calendar year 1934 said Trustees received from Monarch Investment Company, a corporation, distributions in the amount of $153,000, all of which [4] distributions were made by said corporation from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February

28, 1913. The Commissioner has erroneously determined that said distributions were made out of capital only to the extent of $113,377.01, and that the balance thereof, or $39,622.99, was made out of earnings accumulated after February 28, 1913.

(c) During the calendar year 1934 said Trustees paid interest in the amount of $16,967.02 on income tax deficiencies of the estate of Adolph B. Spreckels, deceased, for the years 1926 and 1931, for which said Trustees were liable as transferees of said estate. The Commissioner has erroneously disallowed the deduction of said interest on the ground that it represents an expense of said estate and not of said trust.

(d) Petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for taxes paid under the following circumstances:

During the calendar year 1934 petitioner sold stocks and bonds owned by him and as required by

[5] Title VIII of the Revenue Act of 1926 as amended, and by the laws of the several states, petitioner during said calendar year paid stamp taxes on said sales amounting to $5,693.67. During said calendar year 1934 petitioner made sales of produce for future delivery, and, as required by said Title VIII of the Revenue Act of 1926 as amended, petitioner during said calendar year paid stamp taxes on said last mentioned sales amounting

to $1,525.62; that petitioner filed his income tax return for the calendar year 1934 on the 15th day of March, 1935, showing an income tax due thereon in the sum of $37,897.60. Petitioner paid the income tax shown due upon said return in installments as follows: $9,000 on March 15, 1935, $474.40 on May 18, 1935, $9,474.40 on June 12, 1935, $9,474.40 on September 11, 1935, and $9,474.40 on December 10, 1935; that thereafter and on the 23rd day of December, 1937, petitioner duly filed with the Collector of Internal Revenue at San Francisco, California, a claim for the refund of $4,087.61 income tax overpaid for the calendar year 1934 by reason of petitioner's failure to deduct the above mentioned stamp taxes in computing and paying his Federal income tax for said calendar year; that thereafter and on the 20th day of July, 1938, and in the ninety day letter hereunto attached marked Exhibit "A," the respondent conceded that [6] petitioner was entitled to the deduction of $7,219.29 for stamp taxes paid as hereinbefore stated; that by reason of petitioner's right to take an additional deduction for said sum of $7,219.29 in stamp taxes paid petitioner is entitled to a refund on account of his income tax for said year in the sum of $3,650.36.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum

of $3,650.36, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of this petition, and that petitioner is entitled to a refund of said sum of $3,650.36.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building,
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [7]

State of California,
County of Los Angeles—ss.

Adolph B. Spreckels, being first duly sworn, says;

That he is the Petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information or belief, and that those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 21 day of September, 1938.

[Seal] CHARLES G. GOODMAN
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 13, 1942. [8]

EXHIBIT "A"

Treasury Department
Washington
Office of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To

Jul 20 1938

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 discloses a deficiency of $1,254.11 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the

closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
By JOHN R. KIRK
Deputy Commissioner.

Enclosures:
Statement
Form 870 [9]

STATEMENT

IT:E:1
JHU:90D

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Tax Liability for Taxable Year Ended December 31, 1934

Income tax
Liability—$39,151.71
Assessed—$37,897.60
Deficiency—$1,254.11

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated March 4, 1936; to your protest dated June 4, 1936; to the

statements made at the conference held July 15, 1936; and to your claim for refund of individual income tax in the amount of $4,087.61.

If a petition to the United States Board of Tax Appeals is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

Adjustments to Net Income

Net income as disclosed by return	$121,593.86
Unallowable deductions and additional income:	
(a) Dividends	9,431.67
Total	$131,025.53
Nontaxable income and additional deductions:	
(b) Taxes paid	6,518.49
Net income adjusted	$124,507.04

[10]

Explanation of Adjustments

(a) Your share of adjusted income from Walter D. K. Gibson, et al, Trustees under will, Estate of Adolph B. Spreckels, deceased (Trust), has been determined to be $37,664.21, taxable as dividends. As you included $28,232.54 as dividends from the trust in your return, the amount reported has been increased by $9,431.67.

In determining the correct net income of the trust the amount reported on the fiduciary return was adjusted as follows:

Net income reported on fiduciary return, form 1041	$194,626.17
Add:	
1. Dividends	39,622.99
2. Interest deduction disallowed	16,967.02
Net income adjusted	$251,216.18
Distribution of income:	
Mrs. Alma Spreckels	$134,454.88
Adolph B. Spreckels	37,664.21
Mrs. Alma Spreckels Rosekrans	37,664.21
Mrs. Dorothy S. Dupuy	38,432.88
Estate of Adolph B. Spreckels, Deceased (Trust)	3,000.00
Total	$251,216.18

1. Dividends from the Monarch Investment Company have been allocated as shown below:

Date Paid	Amount Paid	Taxable (From Corporate Earnings Since February 28, 1913)	From Capital	Percent Taxable
March 3, 1934	$130,000.00	$16,622.99	$113,377.01	
November 13, 1934	23,000.00	23,000.00	—	
	$153,000.00	$39,622.99	$113,377.01	25.8974

[11]

As no dividends from the Monarch Investment Company were reported in the fiduciary return as income, the adjustment of this item increases dividends by $39,622.99.

2. The deduction of $16,967.02 for interest paid by the trustees of the trust on income tax deficiencies of the Estate of Adolph B. Spreckels, deceased, has been disallowed, for the reason that the amount represents expense of the estate and not of the trust. See the decision of the United States Board of Tax Appeals in Helen B. Sulzberger et al, 33 B. T. A. 1093.

In determining the fiduciary income taxable to the beneficiaries the examining officer included in distributable income $3,000.00, representing an annuity payment to Anna De Bretteville. As this amount is held to be taxable to the trust, your distributive fiduciary income as adjusted by the report has been reduced by one sixth of $3,000.00 or $500.00.

(b) The deduction of $700.80 for taxes paid on whiskey withdrawn from bonded warehouses has been disallowed in accordance with Income Tax Ruling 2768, Cumulative Bulletin XIII-1, 54 (1934).

An additional deduction of $7,219.29 for taxes paid on the sales of securities and commodities has been allowed in connection with your claim.

You contended that total stamp taxes paid amounted to $7,299.29. The information submitted by the examining officer indicates that the above-stated amount includes securities exchange regis-

tration fee, not in excess of $80.00. This is not deductible as a tax. See Income Tax Ruling 3161, Internal Revenue Bulletin, February 14, 1938, No. 7. The remainder of the taxes claimed, $7,219.29, is held to be deductible in accordance with section 23(c)2 of the Revenue Act of 1934 and General Counsel's Memorandum 18245, Cumulative Bulletin, 1937-1, 70.

Computation of Tax

Net income adjusted		$124,507.04
Less:		
Personal exemption	$ 2,500.00	
Credit for dependents	933.33	3,433.33
Balance (surtax net income)		$121,073.71

[12]

Brought forward		$121,073.71
Less:		
Interest on Liberty Bonds	$ 13,554.94	
Dividends	101,786.71	
Earned income credit	300.00	115,641.65
Net income subject to normal tax		$ 5,432.06
Normal tax at 4% on $5,432.06		217.28
Surtax on $121,073.71		38,958.33
Total tax		$ 39,175.61
Less:		
Income tax paid at source		23.90
Correct income tax liability		$ 39,151.71
Income tax assessed:		
Original, account #201806, May 1935		37,897.60
Deficiency of income tax		$ 1,254.11

[Endorsed]: U. S. B. T. A. Filed Sept. 26, 1938.

[13]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above-named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1934, as alleged in paragraph 3 of the petition. For lack of information denies that the amount of tax in controversy is $4,904.47, as alleged in paragraph 3 of the petition.

4. (a), A and B. Denies that the Commissioner erred in the determination of tax, set forth *the* the said notice of deficiency, as alleged in subparagraph (a) of paragraph 4 of the petition, and [14] in subparagraphs A and B of subparagraph (a) of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that during the calendar year 1934, the trustees of the trust under the will of Adolph B. Spreckels, deceased, received from Monarch Investment Company, a corporation, distributions in

the amount of $153,000.00, and that the Commissioner has determined that of said distributions the amount of $39,622.99 was made out of earnings accumulated after February 28, 1913, as alleged in subparagraph (b) of paragraph 5 of the petition. Denies that said determination by the Commissioner was in error and denies all other allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that the Commissioner has disallowed as a 1934 deduction, claimed by the trustees of the trust under the will of Adolph B. Spreckels, deceased, the amount of $16,967.02, for interest on income tax deficiencies of the estate of Adolph B. Spreckels, deceased, on the ground that such a payment represented an expense of the estate and not of the trust, as alleged in subparagraph (c) of paragraph 5 of the petition. Denies that the Commissioner erred in disallowing said deduction and, for lack of information, denies all other allegations contained in subparagraph (c) of paragraph 5 of the petition. [15]

(d) Admits that the petitioner, in making his completed income tax return for the calendar year 1934, showed a net income subject to Federal income tax in the sum of $121,593.86, and showed an income tax due thereon in the amount of $37,897.60, as alleged in subparagraph (d) of paragraph 5 of the petition. Admits that the Commissioner, in his ninety-day letter, conceded that the petitioner was entitled to a 1934 deduction of $7,219.29 for stamp taxes paid, as alleged in subparagraph (d) of para-

graph 5 of the petition. For lack of information, and for other reasons, denies all other allegations contained in subparagraph (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not heretofore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal be denied.

Signed J. P. WENCHEL,
TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
ARTHUR L. MURRAY,
Special Attorneys,
Bureau of Internal Revenue.

ALM/F 10-28-38

[Endorsed]: U. S. B. T. A. Filed Nov. 3, 1938.

[16]

[Title of Board and Cause.]

APPLICATION FOR LEAVE TO FILE AMENDMENT TO PETITION

To the United States Board of Tax Appeals:

Now comes the petitioner above named and asks leave to file an amendment to his petition in the above entitled proceeding on the ground that the

same is necessary for a proper presentation of petitioner's appeal.

Dated: San Francisco, June 7th, 1939.

HERBERT W. CLARK
WS
LEON de FREMERY
WS
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner

Granted June 8, 1939.

(Signed) R. L. DISNEY
Member U. S. Board of Tax Appeals.

[Endorsed]: U. S. B. T. A. Filed at hearing June 8, 1939. [17]

[Title of Board and Cause.]

AMENDMENT TO PETITION

Now comes the petitioner above named and leave having first been obtained, files this amendment to his petition in the above-entitled proceeding and alleges as follows:

I

That the determination of tax set forth in the notice of deficiency, a copy of which is attached to the original petition, is erroneous in the following

particular in addition to the errors specified in the original petition, viz:

(b) That the Commissioner erred in not allowing as a deduction in determining petitioner's income subject to income tax for the calendar year 1931 the sum of $23,909.29 representing selling commissions paid in connection with the sales of stocks, bonds and commodities. [18]

II

The facts upon which petitioner relies in support of this amendment to his petition and the supplemental assignment of error hereinabove set forth are as follows:

(e) Petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for selling commissions paid in connection with the sales of stocks, bonds and commodities under the following circumstances: during the calendar year 1934 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and during said calendar year paid selling commissions in connection with such sales amounting to $23,909.29; that said selling commissions so paid as aforesaid were not taken as a deduction in computing petitioner's income tax for said year. Under Section 23(a) of the Revenue Act of 1934 and Articles 23(a)-1 and 24-2 of Regulations 86, said commissions are deductible in com-

puting petitioner's net income and petitioner claims the right to deduct the same.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, [19] and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [20]

State of California,
City and County of San Francisco—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing Amendment to Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 23rd day of May, 1939.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: July 30, 1939.

Granted June 8, 1939.

(Signed) R. L. DISNEY

Member U. S. Board of Tax Appeals

[Endorsed]: U. S. B. T. A. Filed at hearing June 8, 1939. [21]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner, admits and denies as follows:

I. (b) Denies the allegations contained in subparagraph (b) of paragraph I of the amendment to petition.

II. (e) Admits that petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86, but denies the remaining allegations contained in subparagraph (e) of paragraph II of the amendment to petition.

III. Denies generally and specifically each and every allegation in the amendment to petition not hereinbefore admitted, qualified, or denied. [22]

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL
T M M
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

TMM:emb 6-9-39

[Endorsed]: U. S. B. T. A. Filed June 15, 1939. [23]

[Title of Board and Cause.]

Docket Nos. 94621, 95639.

Promulgated May 21, 1940.

FINDINGS OF FACT AND OPINION

1. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. Held, selling commissions paid to brokers were properly deducted as business expense. Neuberger v. Commissioner, 104 Fed. (2d) 649.

2. Prior to determination of deficiency, petitioner filed a claim for refund of taxes paid, on the

ground that he had not taken deduction for stamp taxes paid. In determining the deficiency, the stamp taxes were allowed as deductions, but other items resulted in determination of a deficiency. Stipulations show an overpayment of tax. At the hearing, more than three years after the last payment of tax, an amendment was filed, the effect of which was to claim, on new grounds, refund of overpayment. Held, the claim of overpayment is barred by limitations. Sec. 322(d), Revenue Act of 1934; Commissioner v. Rieck, 104 Fed. (2d) 294, and Commissioner v. Estate of George M. Dallas, — Fed. (2d) — (Mar. 25, 1940), followed.

Walter Slack, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

These proceedings, consolidated for hearing, involved originally deficiencies in income tax in the amount of $1,254.11 for the year 1934 and in the amount of $4,675.17 for the year 1935.

All of the errors raised in the original petition were disposed of by stipulation at the trial, will be reflected in computation under Rule 50, and need not further be considered herein. The issues to be examined were raised by amended petition filed in each proceeding at the hearing on June 8, 1939. Two questions are presented—first, whether a trader in securities may deduct as ordinary and necessary expense of business selling commissions paid by him, and, second, whether claim for overpayment set forth in an amended petition filed more than three years after payment of the last installment of tax is timely. The first proposition involves both

taxable years; the second only 1934, in proceeding No. 95639, in which the amended petition asks for refund of overpayment of $4,087.61. [24] In proceeding No. 94621, for 1935, the amended petition asks for refund of overpayment of $1,323.70.

A part of the facts were stipulated at trial, but since the stipulation is brief it will be incorporated in the findings of fact, which we make as follows:

FINDINGS OF FACT.

The petitioner, an individual who resides in San Francisco, California, filed his income tax returns for the years in question with the collector for the first district of California. During the taxable years he maintained an office, with employees keeping a complete set of books, which were kept and the income tax returns were made upon the basis of cash receipts and disbursements. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He paid to brokers selling commissions in connection with such sales as follows: In 1934, $23,692; in 1935, $2,246.25. Petitioner did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon petitioner's books the selling commissions were deducted from the selling price, before net profit or loss was determined.

Petitioner's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of $121,593.86 and a tax of $37,897.60, which was paid in installments, the last payment being made Decem-

ber 16, 1935 in the amount of $9,474.40. On December 23, 1937, petitioner filed a claim for refund of income tax in the amount of $4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of $80, this claim was allowed in the determination of the Commissioner in the deficiency letter, which was dated July 20, 1938. Petition to the Board was filed September 26, 1938, in proceeding No. 95639. It was stipulated that $7,828.51 may be excluded from income for 1934 as determined by the Commissioner, and that the amount of dividend credit should be reduced by $7,828.51.

Petitioner's income tax return for 1935, filed April 15, 1936, showed a net taxable income of $141,146.57 and a tax of $48,554.03, which was paid, the last installment, $12,138.50, being made December 11, 1936. Deficiency letter was dated April 7, 1938. After the filing of the petition for 1935 in proceeding No. 94621 on July 6, 1938, petitioner on March 9, 1939, filed with the collector of internal revenue at San Francisco, California, a claim for refund of income tax of $1,323.70 by reason of petitioner's failure to deduct commissions on sales of bonds, commodities, and stocks. [25]

It was stipulated that income as determined by the Commissioner for 1935 may be reduced by $9,437.24, with a reduction in the same amount in dividend credit.

Petitioner reported on his income tax return for 1934 losses of $114,249.38 from sale of stocks and

commodities, and took as a deduction $2,000; also, for 1935 the losses on commodity and stock transactions were reported as $8,009.69, and loss deducted was $2,000.

OPINION.

Disney: 1. Are selling commissions paid by a trader in securities deductible as business expense?

After the decision of the Circuit Court in Winmill v. Commissioner, 93 Fed. (2d) 494, we allowed selling commissions as well as purchasing commissions, in Harry H. Neuberger, 37 B. T. A. 223. On appeal to the Circuit Court our decision as to selling commissions was affirmed. Neuberger v. Commissioner, 104 Fed. (2d) 649. Certiorari was not applied for by the Commissioner. We think the dicta in Helvering v. Winmill, 305 U. S. 79, and in Helvering v. Union Pacific R. R. Co., 293 U. S. 282, referred to by respondent, are not decisive of the point here presented. We hold therefore that the respondent upon the point is in error, and that the selling commissions are allowable deductions.

The result, as to the year 1935 and in proceeding No. 94621, is that we find there is no deficiency and that there is an overpayment of tax by the petitioner in the amount of $1,323.70 paid on December 11, 1936, both within three years before the filing of claim therefor by amendment to the petition filed on June 8, 1939, and within three years before the filing of the claim for refund on March 9, 1939.

As to the year 1934, in proceeding No. 95639, a different situation is presented. The result of a

stipulation entered into at the hearing is that there was an overpayment for the year 1934, but the respondent objected to the filing of the amendment to the petition, on the ground that the claim of overpayment thereby advanced was not timely, being presented for the first time on June 8, 1939, more than three years after the payment of the last installment of tax. Respondent relies on Commissioner v. Rieck, 104 Fed. (2d) 294; certiorari denied, 308 U. S. 602, and the cases therein cited, and says that case bars consideration of the selling commissions as new grounds for claim of overpayment, because set up by amendment after the statute had run. Petitioner refers us to Georgie W. Rathborne, 39 B. T. A. 56. In the latter we followed our decision in Edward E. Rieck, 35 B. T. A. 1178, which was reversed by Commissioner v. Rieck, supra. In both cases we had entertained and allowed [26] claims for overpayment on new grounds set up in amended petitions, on the theory that such amendments related back to the filing of the original petition, and were therefore not within the bar of the statute. This theory is untenable since the decision of the Circuit Court in the Rieck case. Petitioner, however, seeks to avoid the effect of that decision by a contention that "The new error assigned in the amended petition does not give rise to this overpayment, but serves to prevent its reduction on account of other adjustments." He also argues:

> * * * petitioner is not asking for a refund of any taxes paid by reason of his failure to

> deduct selling commissions in preparing his 1934 income tax return, but is asking for the full allowance of a timely refund claim resulting from a failure to claim a deduction for stamp taxes paid during that year, the amount of which the respondent seeks to reduce by asserting other errors in the return. Petitioner claims the right to offset these other errors by the amount of selling commissions paid and thereby secure the full amount of his timely refund for the stamp taxes.

In other words, petitioner in effect contends that he is utilizing the claim as to deductible selling commissions, not as new ground for claim of overpayment, but merely to offset the offset which the Commissioner, by other items, set up against the original claim of overpayment on grounds of stamp taxes paid but not deducted. Thus, petitioner seems to argue, the original claim for refund, timely filed, is left alive and undiminished, and he now claims thereunder. Thus petitioner seeks by indirection to accomplish what can not be done directly. We think there is no essential difference between the situation here and in the Rieck case, for we think that petitioner is in fact relying upon new grounds for the overpayment. The amended petition, after reciting the facts as to payment of selling commissions of $23,909.29 and alleging thus deductibility concludes:

> Wherefore, petitioner prays that this Board may hear the proceeding and determine that

there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

It thus appears that claim of overpayment is in fact set up anew in the amended petition, and that the only reason therefor lies in the new facts recited—the selling commissions. We think it apparent that the selling commissions are the ground of claim of overpayment. That there is new claim of overpayment is demonstrated by the fact that the claim is for $4,087.61 instead of $3,650.36, the [27] amount of overpayment claimed in the original petition. Also, it is noteworthy that the $4,087.61 overpayment claimed in the amendment is the amount of the original refund claim, filed with the Commissioner prior to determination of deficiency. Thus it appears that petitioner is now relying, not upon his original claim of overpayment of $3,650.36, but instead upon the refund claim. But that refund claim was in effect allowed by the Commissioner, for in determining the deficiency he agreed (except as to $80) that the payment of stamp taxes, pressed as ground of the refund claim, was a deductible item, and therefore gave credit,

in effect, against the deficiency otherwise appearing, of the amount of the refund claim, with the small exception of $80. In Suhr v. United States, 18 Fed. (2d) 81, a very similar situation appears. There a claim for refund was, as here, filed prior to determination of deficiency because of claim that nontaxable stock dividends had been reported as income. After examination of the taxpayer's books the Commissioner gave the taxpayer credit for the dividends, but found a deficiency because of other matters. The taxpayer appealed to the Board, alleging that there was no deficiency, but an overpayment. He also filed an action in the Federal Court. The question was as to jurisdiction of the court. On appeal the Circuit Court said, as to the overpayment: "He was simply entitled to have the overpayment credited against his other tax liability." This seems exactly what the Commissioner did herein. We think it disposed of the original refund claim, that the petitioner here should not now be heard to rely upon that claim, and that he is in fact relying upon the new grounds as to selling commissions, barred by the statute. We find no material distinction between the situation here and that in Commissioner v. Rieck, supra. Moreover, that case has lately been approved and followed in Commissioner v. Estate of George M. Dallas, —— Fed. (2d) —— (C. C. A., 2d Cir., Mar. 25, 1940), wherein the facts were similar to those in the Rieck case. The court held that a refund of the overpayment was barred, under section

322(d) of the Revenue Act of 1932, by the lapse of more than two years before the filing of the amended petition which first set up the grounds of overpayment.

On April 30, 1940 (41 B. T. A. ——), we reconsidered the decision entered in Denholm & McKay Co., 39 B. T. A. 767, and, following Commissioner v. Rieck, supra, and Commissioner v. Estate of George M. Dallas, supra, held that an amended petition filed more than three years after payment of tax does not relate back to the time of filing of original petition, so as to authorize the crediting or refunding of an overpayment in tax attributable to a new issue raised in the [28] amended petition, under section 322 (d) of the Revenue Act of 1934, as amended.

It appearing, from evidence adduced since the filing of the amendment to the petition, that the last payment of tax had been made more than three years before the amendment, we conclude and hold that the petitioner's claim for refund of overpayment is barred by the statute of limitations. Sec. 322 (d), Revenue Act of 1934.

Decision will be entered under Rule 50. [29]

[Title of Board and Cause.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted on behalf of petition to the United States Board of Tax Ap-

peals in compliance with its opinion determining the issues in this proceeding. This computation is submitted without prejudice to the petitioner's right to contest the correctness of the decision entered herein by the Board pursuant to the statutes in such cases made and provided.

WALTER SLACK,
825 Balfour Building, San Francisco, California,
Counsel for Petitioner.

[30]

ADOLPH B. SPRECKELS

Docket No. 95639
Income tax Liability for Year ended December 31, 1934

RE-COMPUTATION OF TAX LIABILITY PREPARED IN ACCORDANCE WITH THE OPINION OF THE UNITED STATES BOARD OF TAX APPEALS, PROMULGATED MAY 21, 1940, 41 B. T. A. No. 160

Income per 90 day letter			$124,507.04
Less exclusion as stipulated			7,828.51
Net income adjusted			$116,678.53
Less: Personal exemption		$ 2,500.00	
Credit for dependents		933.33	3,433.33
Surtax net income			$113,245.20
Less: Interest on Liberty Bonds		$13,554.94	
Dividends:			
90 day letter	$101,786.71		
Reduction as stipulated	7,828.51	93,958.20	
Earned income credit		300.00	$107,813.14
Normal tax income			5,432.06

[31]

Normal tax	$ 217.28
Surtax	34,887.50
Total tax	35,104.78
Less: income tax paid at source	23.90
Correct tax liability	$35,080.88
Income assessed on original return	37,897.60
Overpayment	2,816.72

Petitioner requests that the Board determine as a part of its decision that said overpayment was paid within three years before the filing of a claim for refund, viz., that petitioner paid $9,474.40 on account of his income tax liability for 1934 on December 16, 1935, and filed a claim for refund of $4,087.61 of said taxes on December 23, 1937.

Petitioner has not in the foregoing computation given effect to a deduction for selling commissions amounting to $23,692.00 paid brokers on sales of stocks, bonds and commodities for profit during the year 1934, as the Board in its opinion held any claim for refund of the overpayment of income taxes resulting from the failure to claim such deduction is barred by Section 322 (d) Revenue Act of 1934. Petitioner reserves the right to claim by and in proceedings for review of the Board's decision that such overpayment is refundable to the extent of $1,190.89, the difference between the amount of the timely refund claimed on December 23, 1937, and the amount of the overpayment above shown.

[Endorsed]: U. S. B. T. A. Filed July 3, 1940.

[32]

United States Board of Tax Appeals
Washington

Docket No. 95639.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to hearing on July 24, 1940, on alternative computations submitted by the parties under Rule 50, at which time the respondent conceded that the recomputation filed by the petitioner is correct, it is

Ordered and decided: That there is an overpayment in income tax for the year 1934 in the amount of $2,816.72, which amount was paid within three years before the filing of a claim for refund. (Section 809 (a), Revenue Act of 1938.)

Enter:

Entered Aug. 5, 1940.

[Seal] (Signed) R. L. DISNEY,
Member [33]

[Title of Board and Cause.]

PETITION FOR REVIEW OF DECISION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Adolph B. Spreckels, the petitioner above named, by Walter Slack, his attorney of record, hereby files this his petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals rendered in the above entitled appeal on August 5, 1940 in so far as said decision failed to find that petitioner had overpaid his income tax for the year 1934 in the sum of $4,087.61 (rather than in the sum of $2,816.72, as decided by the Board), within three years before the filing of a claim for refund, and respectfully shows:

I. Venue

The petitioner, Adolph B. Spreckels, is an individual who resides in San Francisco, California. Petitioner filed [34] his federal income tax return for the calendar year 1934 with the collector for the first district of California, whose office is within the jurisdiction of said United States Circuit Court of Appeals for the Ninth Circuit, which is the court within which this review is sought.

II. Nature of the Controversy

The nature of the controversy is as follows:

Petitioner filed his federal income tax return for 1934 on May 9, 1935, showing a net taxable income

of $121,593.86 and a tax liability of $37,897.60, which was paid in installments, the last payment being made on December 16, 1935, in the amount of $9,474.40. On December 23, 1937, petitioner filed a timely claim for refund of income tax in the amount of $4,087.61 on the ground that certain stamp taxes had been paid that had not been claimed as deductions in the return. Respondent in a deficiency letter dated July 20, 1938 conceded this claim with respect to the stamp taxes, with the exception of $80, but, by reason of other adjustments, asserted a deficiency of $1,254.11 for the year. A petition for redetermination was filed with the Board on September 26, 1938 wherein error was assigned as to the other adjustments made by the respondent, and petitioner asserted that he had overpaid his income tax for the year by reason of his failure to claim a [35] deduction for the stamp taxes referred to in the refund claim of December 23, 1937.

At the hearing before the Board on June 8, 1939, petitioner was granted leave to file an amendment to his petition setting forth an additional error on the part of the respondent in failing to allow petitioner a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities in the sum of $23,909.29. The amendment closed with a prayer for the refund of the $4,087.61 claimed in the refund claim filed on December 23, 1937.

The Board held that the selling commissions were legally deductible in determining petitioner's income tax liability, with the result that petitioner had in fact overpaid his income tax by more than $15,000, an amount in excess of the refund claimed on December 23, 1937. However, on the ground that the amendment assigning error in respect to the deduction for selling commissions had not been filed within three years after the payment of the last installment of tax, the Board ruled that the omitted deduction could not be given effect in determining petitioner's income tax liability for the year in question, and limited the refund on account of stamp taxes to $2,816.72, the amount of overpayment resulting from a partial disallowance of respondent's other adjustments. [36]

Petitioner asserted before the Board, and will urge on this petition for review, that the Board has jurisdiction to allow amendments at any time before trial to bring in additional specifications of error in the determination of tax liability, without regard to the elapse of the period for filing claims for refund, and that if the Board's redetermination shows an overpayment, the taxpayer is entitled to a refund of so much of the overpayment as is included in a timely and valid claim therefor.

Wherefore, petitioner prays that the United States Circuit Court of Appeals for the Ninth Circuit review the decision of the United States Board of Tax Appeals entered in the above entitled appeal on August 5, 1940, and determine that petitioner is

entitled to a refund of $4,087.61, the full amount claimed in his refund claim filed on December 23, 1937.

WALTER SLACK,
825 Balfour Building, San Francisco, California; Attorney for Petitioner.

[Endorsed]: U. S. B. T. A. Filed Oct. 19, 1940.

[37]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: J. P. Wenchel, Esq.
Chief Counsel Bureau of Internal Revenue
Washington, D. C.

Please take notice that on October 19, 1940, the above named petitioner filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above entitled appeal and entered on August 5, 1940 in so far as said decision failed to find that petitioner had overpaid his income tax for the year 1934 in the sum of $4,087.61 (rather than in the sum of $2,816.72, as decided by the Board) within three years before the filing of a

claim for refund. A copy of the petition for review [38] as filed is served on you herewith.

Dated: October 21, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[39]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF NOTICE OF FILING OF PETITION FOR REVIEW AND COPY OF PETITION FOR REVIEW

State of California
City and County of San Francisco—ss.

J. A. Poma, being first duly sworn, deposes and says:

That she is, and was at the time of the service hereinafter referred to, a resident of the City and County of San Francisco, State of California, and a citizen of the United States, over the age of twenty-one years, and not a party to nor interested in the above mentioned appeal; that the address of affiant is 2265 Larkin Street, San Francisco, California.

That on the 21st day of October, 1940, affiant deposited in the registered mail at the United States post office at [40] San Francisco, California, a duplicate original of the attached Notice of Filing Petition for Review and a copy of the Petition for Review therein referred to in a sealed en-

velope addressed to J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.; that at the time of such deposit affiant fully prepaid the first class postage thereon and the registry fee therefor; that at the time of such deposit there was regular communication by mail between the said City and County of San Francisco and the city of Washington, D. C.

J. A. POMA

Subscribed and sworn to before me this 21st day of October, 1940.

[Seal] CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 20, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[41]

[Title of Board and Cause]

STATEMENT OF POINTS TO BE RELIED UPON BY PETITIONER ON REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS ENTERED ON AUGUST 5, 1940

Now comes Adolph B. Spreckels, the petitioner in the above entitled appeal, by his attorney, Walter Slack, and states the points upon which he in-

tends to rely on his petition for a review of the above decision, viz:

1. The Board of Tax Appeals having determined that selling commissions in the amount of $23,692.00, paid by petitioner on sales of stocks, bonds and commodities, were allowable deductions in determining petitioner's liability for federal income tax for the year 1934, with the result that petitioner had overpaid his federal income tax for that [42] year in an amount in excess of $15,000.00, and it appearing that petitioner had filed a timely claim for a refund of income tax for that year in the amount of $4,087.61, grounded upon an omitted deduction which entered into the determination of petitioner's taxable income, the Board erred in not allowing the full amount claimed.

2. The Board erred in holding, in effect, that it could not consider, in redetermining petitioner's income tax liability for the year 1934, error in that determination first asserted in an amended petition filed more than three years after the last payment of tax had been made.

3. The Board erred in deciding that the amount of the overpayment of petitioner's income tax for the year 1934 did not exceed the sum of $2,816.72.

4. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934 in an amount not less than $4,087.61.

5. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934 in an amount not less than $4,087.61 within

three years before the filing of a valid claim for refund.

6. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934, in an amount not less than $4,087.61, within three years before the filing [43] of the petition for redetermination.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[44]

[Title of Board and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON REVIEW

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, for use in connection with the petition for review by the Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner in the above appeal, a transcript of the record in the above appeal, prepared as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals. [45]

2. Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination, including attached copy of deficiency notice;

(b) Answer of respondent;

(c) Application for leave to file amendment to petition and order granting same;

(d) Amendment to petition;

(e) Answer of respondent to amendment to petition, if any.

3. The findings of fact and opinion of the Board of Tax Appeals.

4. Petitioner's computation for entry of decision.

5. The decision of the Board.

6. The Petition for Review filed by petitioner in the above appeal, together with Notice of filing the same, and Proof of the service thereof.

7. Statement of Points upon which petitioner intends to rely on the review.

8. Designation of Portions of record, proceedings and evidence to be contained in the record on Review, together with proof of service of same.

Dated: October 21, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[46]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON REVIEW AND OF STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY ON THE REVIEW

State of California
City and County of San Francisco—ss.

J. A. Poma, being first duly sworn, deposes and says:

That she is, and was at the time of the service hereinafter referred to, a resident of the City and County of San Francisco, State of California, and a citizen of the United States over the age of twenty-one years and not a party to nor interested in the above entitled appeal; that the address of affiant is 2265 Larkin Street, San Francisco, California.

That on the 21st day of October, 1940, affiant deposited [47] in the registered mail at the United States post office at San Francisco, California, duplicate originals of the attached Designation of portions of the Record, proceedings and evidence to be contained in the record on Review and of the Statement of Points upon which Petitioner intends to Rely on the Review in a sealed envelope addressed to J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building,

Washington, D. C.; that at the time of such deposit affiant fully prepaid the first class postage thereon and the registry fee therefor; that at the time of such deposit there was regular communication by mail between the said City and County of San Francisco and the city of Washington, D. C.

J. A. POMA

Subscribed and sworn to before me this 21st day of October, 1940.

[Seal] CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 20, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[48]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 5th day of November, 1940.

[Seal] B. D. GAMBLE,
Clerk, United States Board
of Tax Appeals. [49]

[Endorsed]: No. 9682. United States Circuit Court of Appeals for the Ninth Circuit. Adolph B. Spreckels, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed November 18, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9682

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Now comes Adolph B. Spreckels, the petitioner above named, and pursuant to Rule 19 of the above

court designates the entire record contained in the transcript heretofore certified by the Clerk of the United States Board of Tax Appeals and filed in the above entitled cause on November 18, 1940, as the part of the record which petitioner thinks necessary for the consideration of petitioner's petition for review in said cause.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

Consented to:

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Filed Nov. 25, 1940. Paul P. O'Brien, Clerk. [50]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH PETITIONER INTENDS TO RELY

Petitioner, Adolph B. Spreckels, above named hereby adopts as a statement of the points on which he intends to rely on the above review the statement of points to be relied upon by petitioner on review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals entered on

August 5, 1940, filed in the United States Board of Tax Appeals in the above proceeding and contained in the certified transcript of the record filed in the above cause on November 18, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

Service of a copy of the above Statement of Points is hereby acknowledged this 22nd day of November, 1940.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Filed Nov. 25, 1940. Paul P. O'Brien, Clerk. [51]

No. 9682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petitions to Review Decisions of the
United States Board of Tax Appeals

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, March 13, 1941.

Before: Wilbur, Garrecht and Stephens, Circuit Judges.

[Title of Cause—No. 9682]

ORDER OF SUBMISSION

Ordered petition to review herein argued by Mr. Walter Slack, counsel for petitioner, and Mr. Arthur L. Jacobs, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

[Title of Cause—No. 9687]

ORDER OF SUBMISSION

Ordered petition to review herein argued by Mr. Arthur L. Jacobs, Special Assistant to the Attorney General, counsel for petitioner, and by Mr. Walter Slack, counsel for respondent, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, May 15, 1941.

Before: Wilbur, Garrecht and Stephens, Circuit Judges.

[Title of Causes.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above causes, be forthwith filed by the clerk, and that a judgment be filed in each cause and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Causes.]

Upon Petitions to Review Decisions of the United States Board of Tax Appeals.

Before: Wilbur, Garrecht, and Stephens, Circuit Judges.

Garrecht, Circuit Judge:

The taxpayer, a resident of San Francisco, was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He maintained an office with employees, and kept a complete

set of books on the cash receipts and disbursements basis.

Adolph B. Spreckels' income tax return for 1934, which was filed with the collector for the first district of California on May 9, 1935, disclosed a net taxable income of $121,593.86 and a tax of $37,897.60; the tax was paid in installments, the last of which, in the sum of $9,474.40, was made December 16, 1935. December 23, 1937, the taxpayer filed a claim for refund of income tax in the amount of $4,087.61, upon the ground that certain stamp taxes were paid which had not been claimed as deductions in the return. The Commissioner, in the deficiency letter, dated July 20, 1938, allowed this claim, with the exception of $80. This letter from the Commissioner to the taxpayer relative to tax liability for the year 1934, however, asserted a deficiency in income tax for that year in the sum of $1,245.11, arising out of transactions not important here. Thereafter, on September 26, 1938, the taxpayer filed a petition for redetermination in the Board of Tax Appeals, alleging the deficiency to be based upon matters which are unimportant here, and contending he was entitled to refund of $3,650.36. Later, at the hearing before the Board, on June 8, 1939, the taxpayer filed an amendment to his petition, in which he asserted that during the calendar year 1934 he paid, as selling commissions in connection with sales of stocks, bonds, and commodities in the conduct of his businesss, the sum of $23,909.29 which he did not take as a deduction in computing his

income tax for the year 1934 and contended, by reason thereof, he was entitled to a refund of $4,087.61. All of the errors raised by the original petition were disposed of by stipulation at the trial. There were, therefore, but two questions before the Board: (1) Whether the selling commissions were deductible as ordinary and necessary expenses; and (2) if so, whether claim based upon such payments, filed more than three years after the last payment of tax, is timely. The Board announced an affirmative answer to the first question, but held that the claim for refund was barred by the statute of limitations. Section 322(d) of the Revenue Act of 1934, 48 Stat. 680, 751.

The taxpayer's income tax return for 1935, filed April 15, 1936, disclosed a net taxable income of $141,146.57 and a tax of $48,554.03; the tax was paid in installments, the last of which, in the sum of $12,138.50, was made December 11, 1936. A deficiency letter, dated April 7, 1938, addressed to Adolph B. Spreckels by the Commissioner, stated a deficiency of $4,675.17 was disclosed in his income tax liability for 1935. July 6, 1938, the taxpayer filed a petition in the Board of Tax Appeals for redetermination of this deficiency. The errors alleged in this petition are unimportant, for they were also disposed of at the trial by stipulation. An amendment to this petition was also filed at the hearing on June 8, 1939, also raising the question of deductibility of the selling commissions as ordinary and necessary expenses. The Board held in

favor of the taxpayer and entered its decision to the effect that there was an overpayment in income tax for the year 1935 in the sum of $1,490.10, which amount was paid within three years before filing of the amended petition.

The two petitions were consolidated for hearing and were disposed of by the Board in a single opinion, although separate decisions were entered.

In 1934 the taxpayer paid brokers selling commissions of $23,692 in connection with sales of stocks, bonds, and commodities, and in 1935, $2,246.25, in like transactions. He did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon taxpayer's books the selling commissions were deducted from the selling price before the net profit or loss was determined. In his income tax return for 1934 the taxpayer reported losses of $114,249.38 arising out of sales of stocks and commodities, and took a deduction of $2,000; in 1935 he reported losses of $8,009.69 arising out of like transactions and took a deduction of $2,000 thereon.

Separate petitions for review of the Board's decisions were taken with respect to the tax liability for the year 1934 and for the year 1935; the taxpayer is the moving party so far as 1934 is concerned, while the Commissioner brings the 1935 tax liability problem before us. Both petitions will be considered together because the basic question before this court in each case is identical; only in the event that our conclusion on deductibility is in the

taxpayer's favor will it be necessary to consider whether the claim for refund for 1934 was timely filed.

It is provided by Section 23(a) of the Revenue Act of 1934, 48 Stat. 680, 688, that "In computing net income there shall be allowed as deductions: . . . All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . ." This is the provision of the taxing Act which has direct application to the present situation.

Our principal concern here is whether purchasing and selling commissions paid by the taxpayer, engaged in the business of buying and selling securities, are deductible as ordinary and necessary expenses, or must be figured, respectively, as additions to cost or offsets against selling price.

Incidental to the Commissioner's authority to administer the income tax law is the power to make regulations for the information of the taxpayers, the guidance of the collectors, and the realization of purposes of the taxing acts. Section 62 of certain of the later Revenue Acts (notably, 1934, 48 Stat. 680, 700) furnishes specific authority for the publication of such regulations and under that section was published Regulations 86, relating to the income tax under the Revenue Act of 1934. Regulations 86, referring to Section 23(a) of the 1934 Act, quoted above, says, "Among the items included in business expenses are * * * commissions, * * *"

This simple, general statement, is not decisive, for this article concludes with the sentence, "As to items not deductible under any provision of section 23, see section 24," and Article 24-2 of the same Regulations provides, in part, that:

> "* * * Commissions paid in purchasing securities are part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business expense,* are an offset against the selling price." [Italics are by the Court.]

The qualifying clause, which we have emphasized, first appeared in Regulations 77, article 282, covering the Revenue Act of 1932. For several years prior to the publication of Regulations 77, the statement referring to purchasing and selling commissions appeared in the Regulations substantially as written above, without the qualifying clause. As early as Regulations 33, par. 108 (respecting the Revenue Acts of 1913 and 1916), the following definition was in effect:

> "Commissions paid in purchasing and selling securities are a part of the cost or selling price of the securities and not otherwise deductible. They do not constitute expense deductions in a return of income."

Hutton v. Commissioner, 5 Cir., 39 F2d 459, treated, and denied, the deductibility of purchase commissions as ordinary and necessary business

expenses under the Revenue Act of 1921, under which Regulations 62, art. 293, provided as in the 1934 Act, with the exception, of course, of the qualifying clause, not included in those Regulations. The court concluded purchasing commissions were part of the cost of the securities and not deductible as ordinary and necessary expenses.

The provision of Article 23(a)-1 must be read in conjunction with the provisions of Article 24-2 of Regulations 86, applicable here, in order to give recognition to both and do violence to neither. Undoubtedly, the clause, "when such commissions are not an ordinary and necessary business expense," refers to that part of Article 23(a)-1 of Regulations 86, quoted above. It will be noted, however, and it is to be stressed, that the part of Article 24-2 to which we have reference is *specific,* as opposed to the general nature of the reference to "commissions" in Article 23(a)-1, and therefore should control. Helvering v. Winmill, 305 US 79, 83-84.

An opinion was requested of the General Counsel of the Bureau of Internal Revenue on, for all practical purposes, the identical question here involved, under the same section of the 1934 Act and the same Articles of Regulations 86. The opinion (Internal Revenue Bulletin, Cum.Bull. XIV-2, p. 59, XIV—38—7698, G.C.M. 15430) said:

> "The question as to the deductibility of such commissions involves three classes of taxpayers

—(1) a dealer in securities, (2) a trader in securities, and (3) a taxpayer who purchases and sells securities occasionally but not in such quantities or under such circumstances as to constitute him either a dealer or a trader. * * *

"Fundamentally, commissions paid in connection with both purchases and sales of securities, being direct expenses of acquiring and disposing of the property, are direct charges against the profit, or increase the loss, arising from the transaction. * * *

* * * * * *

"* * * there can be no justification for a departure from that method of treatment except in those cases where the detail of accounting on that basis is so burdensome as to make its use impracticable. No such accounting difficulties exist in the case of any of the three classes of taxpayers enumerated above, except the *dealer** Both the occasional seller and the trader are required to account in their income tax returns for the profit or loss on each individual sale. The right to inventory securities is denied to the trader and to the occasional seller. (See article 22(c)-5, Regulations 86.) * * *"

The opinion then continues to explain that no difficulty is experienced by either of the latter two classes of taxpayers in accounting by adding purchasing commissions to the cost of the securities and deducting selling commissions from the selling

---

*Italics are by the Court.

price thereof and that the dealer, also, experiences no difficulty in adding the purchase commissions to the cost of securities, but that the volume of his sales and the numerous selling transactions make it impracticable from the accounting standpoint to match selling commissions against each individual sale. Because of this factor, so reasons the opinion, the dealer is permitted to inventory securities and "to treat his selling commissions as 'ordinary and necessary business expenses,' not because they are technically such but because of practical considerations." No formal recognition of this interpretation was given, says the opinion, until the qualifying clause was inserted in Article 282 of Regulations 77. The opinion concludes with this statement:

> "Selling commissions are an offset against the sale price and are not deductible as ordinary and necessary business expenses, except in the case of a dealer in securities."

We are moved to comment that the interpretation of the regulations by the Assistant General Counsel of the Bureau of Internal Revenue appears intelligent, logical, and reasonable. Moreover, it is but the statement of a long-continued construction of law and regulation by the administrative officers charged with the enforcement thereof.

Regulations 86, in providing for inventories by dealers in securities (art. 22(c)-5) defines "dealer in securities" as "a merchant of securities, . . . with an established place of business, regularly en-

gaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom." This regulation continues—"the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell securities for investment or speculation, . . . are not dealers in securities within the meaning of this rule." These Regulations do not specifically define a "trader." While the Board did not find that the taxpayer was a "trader," it referred to him as such in its opinion, to which statement there was, apparently, no objection. We think, on the record made, that the taxpayer was not a "dealer in securities." Definitely, he was not an occasional purchaser and seller. It would seem to follow, from the exclusion of the two extremes, neither of which classifications fits the business of the taxpayer, that he was a "trader."

If the modifying clause applies only to "dealers in securities," as the regulations seem to indicate, then it does not apply to the taxpayer, because he is not a "dealer" as defined by the same Regulations 86. If the clause had not been inserted in the regulation, the long-continued administrative construction and the adherence by the Congress to the original wording in the re-enactment of Revenue acts, would render the Commissioner's position unassailable. The question then arises, "Why was the clause inserted in an already clear regulation?"

The explanation seems to be that it was placed there for the protection of "dealers," who were compelled, as a matter of accounting practice, to inventory their securities.

In Winmill v. Commissioner, 93 F2d 494, 496, the Circuit Court of Appeals for the Second Circuit had before it the question whether buying and selling commissions were deductible as ordinary and necessary expenses under the Revenue Act of 1932. 47 Stat. 169. The statutory provisions and the regulations (77) were similar to those here involved. The Court of Appeals, in the Winmill case, uncertain whether the taxpayer was engaging in a trade or business, referred to him as a "dealer," and held that if he was engaging in a trade or business, "the commissions paid in the purchase and sale of securities are an expenditure of carrying on that business." In the course of its discussion the court attempted to distinguish certain language appearing in Helvering v. Union Pacific RR. Co., 293 US 282, 286, by stating that the questions there presented "dealt with deductions of commissions on bonds issued by taxpayer itself. The court there approved the regulation providing for the capitalization of the commissions involved." The pertinent language of the Supreme Court in the Union Pacific case is as follows:

> "* * * In this respect the commissions [paid for marketing bonds] do not differ from brokerage commissions paid upon the purchase or

sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax."

The Circuit Court of Appeals remanded the case to the Board to make a finding whether the taxpayer was engaging in a trade or business. On petition of the Commissioner the Supreme Court granted certiorari in the Winmill case. The high court confined its discussion (305 US 79, 84) to purchase commissions, which it held not deductible as an expense, irrespective of whether the taxpayer was engaged in the business of buying and selling securities, and remanded the case to the Circuit Court of Appeals. The Supreme Court's opinion did not treat the question of selling commissions, but did quote with approval the language of the Union Pacific case, supra. The citator does not reveal any subsequent opinion in this case by the Circuit Court of Appeals.

Thereafter, another case involving this problem, inter alia, was presented to the same Circuit Court of Appeals, Neuberger v. Commissioner, 2 Cir., 104 F2d 649, 650. In a per curiam opinion the court conformed to the Supreme Court's ruling in the Winmill case in respect to purchase commissions, but, without discussion, adhered to its former conclusion respecting selling commissions. The tax-

payer petitioned the Supreme Court for issuance of a writ of certiorari, which was denied, 308 US 623. Thereafter, a petition for rehearing was granted by the Supreme Court and the order denying the petition for writ of certiorari was vacated, 310 US 655. The petition for writ of certiorari was granted, limited to certain questions not material here. The Supreme Court's decision in the Neuberger case, 311 US 83, does not discuss, nor decide, any phase of our problem, and therefore it is of no assistance here.

Our attention, likewise, has been drawn to an opinion of the Board of Tax Appeals in the appeal of Alice duPont Ortiz, 42 BTA . . . , promulgated June 21, 1940, wherein it is held, upon the authority of the opinions of the Circuit Court of Appeals for the Second Circuit in the Winmill and Neuberger cases, supra, that one engaged in purchasing and selling securities as a business is entitled to deduct selling commissions as an expense.

No compelling reason, however, presents itself to us for treating purchasing commissions, concededly non-deductible as expenses, differently from selling commissions. If the purchase commissions are to be regarded as a part of the cost of the securities, then, logically, the selling commissions should be considered as an offset against the sale price. Ordinarily the trader or occasional seller calculates each individual sale with reference to profit or loss, and as he normally includes the purchase commissions in the calculation of the cost, so he

fixes his asking price with due regard to the cost of disposal; else how would he know whether profit or loss was to be his realization? The Supreme Court has never passed squarely upon the precise question here before us, but it has shown a disposition to adhere to the reasoning expressed in the Union Pacific case, supra, and until that language, heretofore quoted, is repudiated or overruled, we feel obliged to hold that selling commissions, except in the case of a dealer in securities, are not deductible as expenses, but must be considered as an offset against selling prices.

The decision of the Board of Tax Appeals on the Commissioner's petition for review in case No. 9687, with respect to income tax liability for the year 1935, is reversed. The decision of the Board in case No. 9682, respecting the 1934 return, is affirmed, because the claimed additional refund was based upon selling commissions which we hold not deductible as expenses.

[Endorsed]: Opinion. Filed May 15, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9682

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals,

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered May 15, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, July 28, 1941.

Before: Wilbur, Garrecht and Stephens,
Circuit Judges.

[Title of Causes.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of Adolph B. Spreckels, filed June 13, 1941, for a rehearing of above causes, and filed within time allowed therefor by rule of court, be, and hereby is denied.

[Title of Circuit Court of Appeals and Causes.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Walter Slack, counsel for Adolph B. Spreckels, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandates of this Court in the above causes be, and hereby is stayed to and including September 6, 1941; and in the event the petitions for writs of certiorari to be made by Adolph B. Spreckels herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandates of this Court are to

be stayed until after the said Supreme Court passes upon the said petitions.

FRANCIS A. GARRECHT
United States Circuit Judge

Dated: San Francisco, California, Aug. 2, 1941.

[Endorsed]: Filed Aug. 2, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Sixty-eight (68) pages, numbered from and including 1 to and including 68, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of August, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 582

ADOLPH B. SPRECKELS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1941.

CERTIORARI GRANTED OCTOBER 20, 1941.

NO. 9687

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ADOLPH B. SPRECKELS,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Petition	13
Answer	12
Answer to Amendment to Petition	17
Appearances	1
Assignments of Error	32
Decision	29
Designation of Portions of Record	40
Designation of Portions of Record to be Printed	39
Docket Entries	1
Findings of Fact and Opinion	19
Notice of Filing Petition for Review	35, 36
Opinion	22
Petition	4
Amendment to	13
Petition for Review	30

Page

Review:
Assignments of Error 32
Designation of Portions of Record to be Printed 39
Petition for 30
Statement of Points on 37
Statement of Points 37

Proceedings in U. S. C. C. A., Ninth Circuit 45
Clerk's note re submission, etc. 45
Judgment—Case No. 9687 45
Clerk's certificate 46
Order allowing certiorari 47

APPEARANCES:

For Petitioner:

HERBERT W. CLARK, Esq.,
LEON de FREMERY, Esq.,
WALTER SLACK, Esq.,

For Respondent:

T. M. MATHER, Esq.,
E. M. WOOLF, Esq.

Docket No. 94621

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1938

July 6—Petition received and filed. Taxpayer notified. (Fee paid)

July 7—Copy of petition served on General Counsel.

Aug. 9—Answer filed by General Counsel.

Aug. 9—Request for Circuit hearing in San Francisco filed by General Counsel.

Aug. 11—Notice issued placing proceeding on San Francisco Calendar. Service of answer and request thereon.

1939

Mar. 25—Hearing set May 29, 1939, San Francisco, California.

June 8—Hearing had before Mr. Disney on merits. Submitted. Called May 25, 1939. Petitioner moves to amend petition—granted. Motion to consolidate dockets 94631 and 95639 granted. Respondent allowed usual time to file amended answers. Application to file an amended petition filed—copies served. Briefs due July 25, 1939—reply due 8/15/39.

June 15—Answer to amendment to petition filed by General Counsel.

June 27—Transcript of hearing of June 8, 1939 filed.

July 22—Brief filed by General Counsel.

July 24—Brief filed by taxpayer. 7/24/39 copy served.

Aug. 10—Reply brief filed by General Counsel.

Aug. 17—Notice to send future notices to Walter Slack as counsel, filed.

Aug. 25—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 8/28/39 granted.

Aug. 29—Copy of motion and reply brief served on General Counsel.

1940

May 21—Findings of fact and opinion rendered—R. L. Disney, Division 4. Decision will be entered under Rule 50.

June 19—Computation of deficiency filed by General Counsel.

1940

June 24—Hearing set July 24, 1940 on settlement.

July 3—Computation of deficiency filed by taxpayer. 7/5/40 copy served.

July 19—Notice to send all notices to Walter Slack filed by Herbert W. Clark and Leon de Fremery.

July 24—Hearing had before Mr. Smith on settlement under Rule 50. Respondent concedes petitioner's recomputation correct —referred to Mr. Disney for decision.

July 29—Notice of the appearance of Walter Slack as counsel filed. [1*]

July 31—Transcript of hearing of July 24, 1940 filed.

Aug. 5—Decision entered—R. L. Disney, Division 4.

Oct. 22—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by General Counsel.

Oct. 31—Proof of service filed by General Counsel (2).

Nov. 13—Statement of points filed with proof of service thereon.

Nov. 13—Designation of portions of record to be contained in record filed by General Counsel with proof of service and agreement thereon.

Nov. 13—Agreed designation of portions of record to be printed, filed. [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 94621

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:1-JHU-90D), dated April 7, 1938, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual, with his principal office at 2 Pine Street, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on April 7, 1938.

3. The taxes in controversy are income taxes for the calendar year 1935, and in the amount of $4,909.17. [3]

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including in petitioner's income the amount of $8,937.24, erron-

eously alleged to be taxable dividends received by petitioner from Monarch Investment Company.

(b) The Commissioner erred in increasing the petitioner's distributive share of the income received by the Trustees under the Will of Adolph B. Spreckels, deceased, by the amount of $500.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the calendar year 1935 the petitioner received from Monarch Investment Company, a corporation, distributions in the amount of $8,937.24, all of which distributions were made by said corporation from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February 28, 1913. The Commissioner has erroneously determined that said distributions were made out of earnings accumulated after February 28, 1913.

(b) It is impossible to ascertain why the Commissioner has increased the petitioner's distributive share of the income received by the Trustees under the Will of Adolph B. Spreckels, deceased, from the amount of $11,537.05, as reported, to the amount of $12,037.05. An examination of the Revenue Agent's original report and supplemental report on said trust [4] indicates that the only change made by the Revenue Agent to the net income of said trust was to include therein the amount of $32,811.72 alleged to be taxable dividends received from Monarch Investment Company. Of said amount petitioner received as his distributive share

the sum of $1,000, which amount petitioner alleges is not taxable income for the reason that said distributions in the amount of $32,811.72 were made by said Monarch Investment Company from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February 28, 1913. If the increase in the amount of $500 in petitioner's distributive share of the income of said trust represents a part of said $1,000 received by petitioner from said Trustees as aforesaid, then petitioner asserts that said sum of $500 is nontaxable to him, for the reason that it is a part of a capital distribution made by said Monarch Investment Company.

(c) On or about December 11, 1936, petitioner paid to the Collector of Internal Revenue at San Francisco, California, income taxes for the calendar year 1935 in the amount of $12,138.50.

Wherefore, petitioner prays that this board may hear the proceeding and determine that there is an overpayment of income taxes in the amount of $234 for the calendar year 1935, and that said taxes were paid by the petitioner [5] within three years before the filing of this petition.

HERBERT W. CLARK
LEON de FREMERY
Counsel for Petitioner
1110 Crocker Building
San Francisco, California [6]

State of California,
County of San Diego—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the Petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information or belief, and that those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 1st day of July, 1938.

[Notarial Seal] MARK VILIM
Notary Public in and for the County of San Diego, State of California.

My Commission Expires February 26, 1939. [7]

EXHIBIT "A"

IT:E:I
JHU:90D Apr 7 1938

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1935 discloses a deficiency of $4,675.17 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the de-

ficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING
Commissioner,
By (Signed) JOHN R. KIRK
Deputy Commissioner.

Enclosures:
Statement
Form 870

JHU/EC--3 [8]

STATEMENT

IT:E:1
JHU:90D

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Tax Liability for Taxable Year Ended
December 31, 1935
Income Tax

Year—1935.
Liability—$53,229.20.
Assessed—$48,554.03.
Deficiency—$4,675.17.

In making this determination of your tax liability, careful consideration has been given to the internal revenue agent's report dated April 19, 1937; to your protest dated June 16, 1937, and to the statements made at the conference held on August 26, 1937.

A copy of this letter and enclosures has been mailed to your representative Mr. Herbert W. Clark, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustments to Net Income

Net income as disclosed by return		$141,146.52
Unallowable deductions and additional income:		
(a) Interest	$ 90.00	
(b) Dividends	8,987.24	9,077.24
Total		$150,223.76
Nontaxable income and additional deductions:		
(c) Interest on taxfree covenant bonds		90.00
Net income adjusted		$150,133.76

Explanation of Adjustments

(a) and (c) Interest on bonds of the Los Angeles Gas and Electric Company which was erroneously included in interest from tax-free covenant bonds has been transferred to ordinary interest. [9]

(b) Dividends from the Monarch Investment Company in the amount of $8,937.24 which you received were not included in income. The Bureau holds that the dividends in question are 100 percent taxable, therefore the amount has been added to income. Dividends from the Reynolds Tobacco Co. reported as $2,250.00, have been reduced to $1,800.00, due to excluding $450.00 which was not payable until January 1, 1936.

Your share of adjusted income from Walter D. K. Gibson, et al., Trustees under will, Estate of Adolph B. Spreckels, Deceased (Trust) has been determined to be $12,037.05, taxable as dividends. As you included $11,537.05 as dividends from the trust in your return, the amount reported has been increased by $500.00.

In determining the correct net income of the trust, the amount reported on the fiduciary return was adjusted as follows:

Net income reported on fiduciary return, form 1041	$200,986.12
Add:	
Dividends	32,811.72
Net income adjusted	$233,797.84
Distribution of income:	
Mrs. Alma Spreckels	$194,686.69
Adolph B. Spreckels	12,037.05
Mrs. Alma Spreckels Rosekrans	12,037.05
Mrs. Dorothy S. Dupuy	12,037.05
Estate of Adolph B. Spreckels, Deceased (Trust)	3,000.00
Total	$233,797.84

Dividends from the Monarch Investment Company in the amount of $32,811.72 were received by the trust, but were not included in income for the reason that they were considered to be distributions from capital. As the Bureau holds that the dividends are 100 percent taxable, fiduciary income has been increased by $32,811.72.

Computation of Tax

Net income adjusted	$150,133.76
Less:	
Personal exemption and credit for dependents	1,791.67
Balance (surtax net income)	$148,342.09

Brought forward		$148,342.09
Less:		
Interest on Liberty Bonds	$ 10,548.62	
Dividends	134,613.29	
Earned income credit	300.00	145,461.91
Net income subject to normal tax		$ 2,880.18
Normal tax at 4% on $2,880.18		115.21
Surtax on $148,342.09		53,137.89
Total		$ 53,253.10
Less:		
Income tax paid at source		23.90
Correct income tax liability		$ 53,229.20
Income tax assessed:		
Original, account #202428, April, 1936		48,554.03
Deficiency of income tax		$ 4,675.17

[Endorsed]: U.S.B.T.A. Filed July 6, 1938. [11]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a) and (b). Denies that the Commissioner erred in the determination of the deficiency alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5 (a). Admits that during the calendar year 1935 the petitioner received from the Monarch Investment Company, a corporation, distributions in the amount of $8,937.24, but denies the remaining allegations contained in said paragraph.

5 (b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

5 (c). For lack of information denies the allegations contained in subparagraph (c) of paragraph 5 of the petition. [12]

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL, TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed Aug. 9, 1938. [13]

[Title of Board and Cause.]

AMENDMENT TO PETITION

Now comes the petitioner above named and leave having been first obtained, files this amendment to

his petition in the above-entitled proceeding, and alleges as follows:

I.

That the determination of tax set forth in the notice of deficiency, a copy of which is attached to the original petition, is erroneous in the following particular in addition to the errors specified in the original petition, viz:

(c) That the Commissioner erred in not allowing as a deduction in determining petitioner's income subject to income tax for the calendar year 1935 the sum of $2,363.75 representing selling commissions paid in connection with sales of stocks, bonds and commodities. [14]

II.

The facts upon which petitioner relies in support of this amendment to his petition and the supplemental assignment of error hereinabove set forth are as follows:

(d) Petitioner in making his income tax return for the calendar year 1935 showed a net income subject to Federal income tax in the sum of $141,146.52; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities under the following circumstances:

(i) During the calendar year 1935 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and

during said calendar year paid selling commissions in connection with such sales amounting to $2,363.75; that said selling commissions so paid as aforesaid were not taken as a deduction in computing petitioner's income tax for said year. Under section 23 (a) of the Revenue Act of 1934 and Articles 23 (a)-1 and 24-2 of Regulations 86 said commissions are deductible in computing petitioner's net income and petitioner claims the right to deduct the same.

(ii) That after the filing of the petition in the above-entitled proceeding, and on the 9th day of March, 1939, petitioner duly filed with the Collector of Internal Revenue [15] at San Francisco, California, a claim for the refund of $1,323.70 income tax overpaid for the calendar year 1935 by reason of petitioner's failure to deduct the above mentioned commissions on sales of stocks, bonds and commodities in computing and paying his Federal income tax for said calendar year; that by reason of petitioner's right to take an additional deduction in the amount of $2,363.75 for selling commissions as aforesaid petitioner is entitled to a refund on account of his income tax for said year in the sum of $1,323.70.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1935, and that petitioner has overpaid his income tax for said year in the sum of $1,557.70, and that said taxes were paid by said peti-

tioner within three years before the filing of the original petition in this proceeding, and that $1,323.70 of said taxes were paid within three years before the filing of a refund claim therefor with the Collector of Internal Revenue for the First District of California.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [16]

State of California
City and County of San Francisco—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing Amendment to Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 23rd day of May, 1939.

(Seal) LOUIS WIENER
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: July 30, 1939.

[Endorsed]: U.S.B.T.A. Filed at hearing June 8, 1939. [17]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner, admits and denies as follows:

I. (c) Denies the allegations contained in subparagraph (c) of paragraph I of the amendment to petition.

II. (d) Admits that petitioner in making his income tax return for the calendar year 1935 showed a net income subject to Federal income tax in the sum of $141,146.52, but denies the remaining allegations contained in subparagraph (d) of paragraph II of the amendment to petition.

(i) Denies the allegations contained in subparagraph (i) of paragraph II of the amendment to petition.

(ii) Admits that after the filing of the petition in the above-entitled proceeding, and on the 9th day of March, 1939, petitioner duly filed with the Collector of Internal Revenue at [18] San Francisco, California, a claim for the refund of $1,323.70 income tax for the calendar year 1935 by reason of petitioner's failure to deduct commissions on sales

of stocks, but denies the remaining allegations contained in subparagraph (ii) of paragraph II of the amendment to petition.

III. Denies generally and specifically each and every allegation in the amendment to petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

TMM:emb 6-9-39.

[Endorsed]: U.S.B.T.A. Filed June 15, 1939. [19]

United States Board of Tax Appeals

Docket Nos. 94621, 95639

Promulgated May 21, 1940.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

1. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. Held, selling commissions paid to brokers were properly deducted as business expense. Neuberger v. Commissioner, 104 Fed. (2d) 649.

2. Prior to determination of deficiency, petitioner filed a claim for refund of taxes paid, on the ground that he had not taken deduction for stamp taxes paid. In determining the deficiency, the stamp taxes were allowed as deductions, but other items resulted in determination of a deficiency. Stipulations show an overpayment of tax. At the hearing, more than three years after the last payment of tax, an amendment was filed, the effect of which was to claim, on new grounds, refund of overpayment. Held, the claim of overpayment is barred by limitations. Sec. 322 (d), Revenue Act of 1934; Commissioner v. Rieck, 104 Fed. (2d) 294,

and Commissioner v. Estate of George M. Dallas, — Fed. (2d) — (Mar. 25, 1940), followed.

Walter Slack, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

Those proceedings, consolidated for hearing, involved originally deficiencies in income tax in the amount of $1,254.11 for the year 1934 and in the amount of $4,675.17 for the year 1935.

All of the errors raised in the original petition were disposed of by stipulation at the trial, will be reflected in computation under Rule 50, and need not further be considered herein. The issues to be examined were raised by amended petition filed in each proceeding at the hearing on June 8, 1939. Two questions are presented—first, whether a trader in securities may deduct as ordinary and necessary expense of business selling commissions paid by him, and, second, whether claim for overpayment set forth in an amended petition filed more than three years after payment of the last installment of tax is timely. The first proposition involves both taxable years; the second only 1934, in proceeding No. 95639, in which the amended petition asks for refund of overpayment of $4,087.61. [20] In proceeding No. 94621, for 1935, the amended petition asks for refund of overpayment of $1,323.70.

A part of the facts were stipulated at trial, but since the stipulation is brief it will be incorporated in the findings of fact, which we make as follows:

FINDINGS OF FACT

The petitioner, an individual who resides in San Francisco, California, filed his income tax returns for the years in question with the collector for the first district of California. During the taxable years he maintained an office, with employees keeping a complete set of books, which were kept and the income tax returns were made upon the basis of cash receipts and disbursements. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He paid to brokers selling commissions in connection with such sales as follows: In 1934, $23,692; in 1935, $2,246.25. Petitioner did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon petitioner's books the selling commissions were deducted from the selling price, before net profit or loss was determined.

Petitioner's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of $121,593.86 and a tax of $37,897.60, which was paid in installments, the last payment being made December 16, 1935, in the amount of $9,474.40. On December 23, 1937, petitioner filed a claim for refund of income tax in the amount of $4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of $80, this claim was allowed in the determination of the Commissioner in the deficiency letter, which was dated July 20, 1938. Petition to the Board was filed September 26, 1938, in

proceeding No. 95639. It was stipulated that $7,828.51 may be excluded from income for 1934 as determined by the Commissioner, and that the amount of dividend credit should be reduced by $7,828.51.

Petitioner's income tax return for 1935, filed April 15, 1936, showed a net taxable income of $141,146.57 and a tax of $48,554.03, which was paid, the last installment, $12,138.50, being made December 11, 1936. Deficiency letter was dated April 7, 1938. After the filing of the petition for 1935 in proceeding No. 94621 on July 6, 1938, petitioner on March 9, 1939, filed with the collector of internal revenue at San Francisco, California, a claim for refund of income tax of $1,323.70 by reason of petitioner's failure to deduct commissions on sales of bonds, commodities, and stocks. [21]

It was stipulated that income as determined by the Commissioner for 1935 may be reduced by $9,437.24, with a reduction in the same amount in dividend credit.

Petitioner reported on his income tax return for 1934 losses of $114,249.38 from sale of stocks and commodities, and took as a deduction $2,000; also, for 1935 the losses on commodity and stock transactions were reported as $8,009.69, and loss deducted was $2,000.

OPINION

Disney: 1. Are selling commissions paid by a trader in securities deductible as business expense?

After the decision of the Circuit Court in Winmill v. Commissioner, 93 Fed. (2d) 494, we allowed selling commissions as well as purchasing commissions, in Harry H. Neuberger, 37 B. T. A. 223. On appeal to the Circuit Court our decision as to selling commissions was affirmed. Neuberger v. Commissioner, 104 Fed. (2d) 649. Certiorari was not applied for by the Commissioner. We think the dicta in Helvering v. Winmill, 305 U. S. 79, and in Helvering v. Union Pacific R. R. Co., 293 U. S. 282, referred to by respondent, are not decisive of the point here presented. We hold therefore that the respondent upon the point is in error, and that the selling commissions are allowable deductions.

The result, as to the year 1935 and in proceeding No. 94621, is that we find there is no deficiency and that there is an overpayment of tax by the petitioner in the amount of $1,323.70 paid on December 11, 1936, both within three years before the filing of claim therefor by amendment to the petition filed on June 8, 1939, and within three years before the filing of the claim for refund on March 9, 1939.

As to the year 1934, in proceeding No. 95639, a different situation is presented. The result of a stipulation entered into at the hearing is that there was an overpayment for the year 1934, but the respondent objected to the filing of the amendment to the petition, on the ground that the claim of overpayment thereby advanced was not timely, being presented for the first time on June 8, 1939, more than three years after the payment of the last

installment of tax. Respondent relies on Commissioner v. Rieck, 104 Fed. (2d) 294; certiorari denied, 308 U. S. 602, and the cases therein cited, and says that case bars consideration of the selling commissions as new grounds for claim of overpayment, because set up by amendment after the statute had run. Petitioner refers us to Georgie W. Rathborne, 39 B. T. A. 56. In the latter we followed our decision in Edward E. Rieck, 35 B. T. A. 1178, which was reversed by Commissioner v. Rieck, supra. In both cases we had entertained and allowed [22] claims for overpayment on new grounds set up in amended petitions, on the theory that such amendments related back to the filing of the original petition, and were therefore not within the bar of the statute. This theory is untenable since the decision of the Circuit Court in the Rieck case. Petitioner, however, seeks to avoid the effect of that decision by a contention that "The new error assigned in the amended petition does not give rise to this overpayment, but serves to prevent its reduction on account of other adjustments." He also argues:

> * * * petitioner is not asking for a refund of any taxes paid by reason of his failure to deduct selling commissions in preparing his 1934 income tax return, but is asking for the full allowance of a timely refund claim resulting from a failure to claim a deduction for stamp taxes paid during that year, the amount of which the respondent seeks to reduce by

> asserting other errors in the return. Petitioner claims the right to offset these other errors by the amount of selling commissions paid and thereby secure the full amount of his timely refund for the stamp taxes.

In other words, petitioner in effect contends that he is utilizing the claim as to deductible selling commissions, not as new ground for claim of overpayment, but merely to offset the offset which the Commissioner, by other items, set up against the original claim of overpayment on grounds of stamp taxes paid but not deducted. Thus, petitioner seems to argue, the original claim for refund, timely filed, is left alive and undiminished, and he now claims thereunder. Thus petitioner seeks by indirection to accomplish what can not be done directly. We think there is no essential difference between the situation here and in the Rieck case, for we think that petitioner is in fact relying upon new grounds for the overpayment. The amended petition, after reciting the facts as to the payment of selling commissions of $23,909.29 and alleging thus deductibility, concludes:

> Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for re-

> fund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

It thus appears that claim of overpayment is in fact set up anew in the amended petition, and that the only reason therefor lies in the new facts recited —the selling commissions. We think it apparent that the selling commissions are the ground of claim of overpayment. That there is new claim of overpayment is demonstrated by the fact that the claim is for $4,087.61 instead of $3,650.36, the [23] amount of overpayment claimed in the original petition. Also, it is noteworthy that the $4,087.61 overpayment claimed in the amendment is the amount of the original refund claim, filed with the Commissioner prior to determination of deficiency. Thus it appears that petitioner is now relying, not upon his original claim of overpayment of $3,650.86, but instead upon the refund claim. But that refund claim was in effect allowed by the Commissioner, for in determining the deficiency he agreed (except as to $80) that the payment of stamp taxes, pressed as ground of the refund claim, was a deductible item, and therefore gave credit, in effect, against the deficiency otherwise appearing, of the amount of the refund claim, with the small exception of $80. In Suhr v. United States, 18 Fed. (2d) 81, a very similar situation appears. There a claim for refund was, as here, filed prior to determination of defi-

ciency because of claim that nontaxable stock dividends had been reported as income. After examination of the taxpayer's books the Commissioner gave the taxpayer credit for the dividends, but found a deficiency because of other matters. The taxpayer appealed to the Board, alleging that there was no deficiency, but an overpayment. He also filed an action in the Federal court. The question was as to jurisdiction of the court. On appeal the Circuit Court said, as to the overpayment: "He was simply entitled to have the overpayment credited against his other tax liability." This seems exactly what the Commissioner did herein. We think it disposed of the original refund claim, that the petitioner here should not now be heard to rely upon that claim, and that he is in fact relying upon the new grounds as to selling commissions, barred by the statute. We find no material distinction between the situation here and that in Commissioner v. Rieck, supra. Moreover, that case has lately been approved and followed in Commissioner v. Estate of George M. Dallas, —— Fed. (2d) —— (C. C. A., 2d Cir., Mar. 25, 1940), wherein the facts were similar to those in the Rieck case. The court held that a refund of the overpayment was barred, under section 322 (d) of the Revenue Act of 1932, by the lapse of more than two years before the filing of the amended petition which first set up the grounds of overpayment.

On April 30, 1940 (41 B. T. A. ——), we reconsidered the decision entered in Denholm & McKay

Co., 39 B. T. A. 767, and, following Commissioner v. Rieck, supra, and Commissioner v. Estate of George M. Dallas, supra, held that an amended petition filed more than three years after the payment of tax does not relate back to the time of filing of original petition so as to authorize the crediting or refunding of an overpayment in tax attributable to a new issue raised in the [24] amended petition, under section 322 (d) of the Revenue Act of 1934, as amended.

It appearing, from evidence adduced since the filing of the amendment to the petition, that the last payment of tax had been made more than three years before the amendment, we conclude and hold that the petitioner's claim for refund of overpayment is barred by the statute of limitations. Sec. 322 (d), Revenue Act of 1934.

Decision will be entered under Rule 50. [25]

United States Board of Tax Appeals
Washington

Docket No. 94621.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to hearing on July 24, 1940, on alternative computations submitted by the parties under Rule 50, at which time the respondent conceded that the recomputation filed by the petitioner is correct, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within three years before the filing of the amended petition. (Section 809 (a), Revenue Act of 1938.)

Enter:

(Seal) (Signed) R. L. DISNEY,
Member.

Entered Aug. 5, 1940. [26]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A. No. 94621

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner on Review,

v.

ADOLPH B. SPRECKELS,

Respondent on Review.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes the Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

The petitioner on review is the duly appointed, qualified and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

The respondent on review, Adolph B. Spreckels

(hereinafter referred to as the taxpayer), is an individual, with his principal office at 2 Pine Street, San Francisco, California. The taxpayer filed his Federal income tax return for the calendar year 1935 with the Collector of [27] Internal Revenue for the First District of California, whose office is located at San Francisco, California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner files this petition pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings

On April 7, 1938, the Commissioner determined a deficiency in income tax for the calendar year 1935 in the amount of $4,675.17, and sent to the taxpayer by registered mail a notice of said deficiency, in accordance with section 272(a) of the Revenue Act of 1934. Thereafter, and on July 6, 1938, the taxpayer filed a petition for a redetermination of said deficiency by the United States Board of Tax Appeals.

The case was tried before the Board of Tax Appeals on June 8, 1939, at San Francisco, California.

On May 21, 1940, the Board promulgated its findings of fact and opinion (41 B. T. A. 1204), and on August 5, 1940, entered its decision that there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within three years before the filing of the amended petition (Section 809(a), Revenue Act of 1938).

III.

Nature of Controversy

The question involved is whether a trader in securities may deduct as ordinary and necessary expenses of business selling commissions paid [28] by him, or whether they should be used as an offset against the selling price in computing gain or loss.

Taxpayer, who was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit, in 1935 paid to brokers selling commissions in the sum of $2,246.25 in connection with such sales. Taxpayer did not deduct the selling commissions in computing income in making his income tax return for the year 1935. Upon taxpayer's books the selling commissions were deducted from the selling price, before net profit or loss was determined. Taxpayer reported on his income tax return for 1935 losses of $8,009.69 from sale of stocks and commodities, and took as a deduction $2,000. Such action was not disturbed by the Commissioner in his notice of deficiency. At the hearing before the Board, taxpayer by amendment to his petition raised the issue with respect to deductibility of selling commissions as a business expense.

The Board held that these selling commissions were allowable deductions as ordinary and necessary business expenses.

IV.

ASSIGNMENTS OF ERROR

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and

in the opinion and final decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals;

[29]

The United States Board of Tax Appeals erred:

1. In holding and deciding that there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within three years before the filing of the amended petition (section 809(a), Revenue Act of 1938).

2. In failing to sustain the deficiency in income tax determined by the Commissioner for the year 1935 in the amount of $4,675.17 less the proper reduction of said amount to reflect the adjustments agreed upon by the parties at the hearing before the Board of Tax Appeals.

3. In holding that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are allowable deductions as ordinary and necessary business expenses.

4. In failing to hold that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are not allowable deductions as ordinary and necessary business expenses but are an offset against the selling price in computing gain or loss.

5. In that its opinion and decision are not supported by the evidence and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted [30] to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

(Signed) SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Signed) J. P. WENCHEL,
RLW,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
J. M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue. [31]

United States of America.
District of Columbia—ss.

John M. Morawski, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on informa-

tion and belief, and as to those matters he believes it to be true.

(Signed) JOHN M. MORAWSKI,
Special Attorney, Bureau of Internal Revenue.

Sworn and subscribed to before me this 17th day of October, 1940.

GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 15, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 22, 1940.

[32]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did on the 22nd day of October, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the

assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of October, 1940.

(Signed) J. P. WENCHEL,
RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 28 day of October, 1940.

(Signed) ADOLPH B. SPRECKELS,
Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Oct. 31, 1940.

[33]

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Walter Slack, Esq.,
825 Balfour Building,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did on the 22nd day of October, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Ap-

peals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of October, 1940.

(Signed) J. P. WENCHEL,
RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 24 day of October, 1940.

(Signed) WALTER SLACK,
Counsel for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Oct. 31, 1940.

[34]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENTS OF POINTS

Comes Now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

The United States Board of Tax Appeals erred:

1. In holding and deciding that there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within

three years before the filing of the amended petition (section 809(a), Revenue Act of 1938).

2. In failing to sustain the deficiency in income tax determined by the Commissioner for the year 1935 in the amount of $4,675.17 less the proper reduction of said amount to reflect the adjustments agreed upon by the parties at the hearing before the Board of Tax Appeals.

3. In holding that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are allowable deductions as ordinary and necessary business expenses.

4. In failing to hold that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are not allowable deductions as ordinary and necessary business expenses but are [35] an offset against the selling price in computing gain or loss.

5. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

J. P. WENCHEL, W
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the above statement of points is hereby acknowledged this 6th day of November, 1940.

(Signed) WALTER SLACK,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Nov. 13, 1940.

[36]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED

Comes Now the petitioner on review herein, and complying with the rules of this Court, pertaining to the designation of the portions of the record to be printed, states that he relies upon the entire record certified by the Clerk of the Board of Tax Appeals to this Court, and directs that said record so certified be printed as the record on review.

Respectfully submitted,

J. P. WENCHEL, W
Chief Counsel, Bureau of Internal Revenue.

Consented to:

(Signed) WALTER SLACK,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Nov. 13, 1940.

[37]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN RECORD ON REVIEW

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.
2. Pleadings:
   - (a) Petition,
   - (b) Answer to petition,
   - (c) Amendment to petition,
   - (d) Answer to amendment to petition.
3. Board's findings of fact, opinion and decision.
4. Petition for review.
5. Notices of filing petition for review.
6. Statement of points.
7. Designation of portions of the record to be printed. [38]

8. This designation.

J. P. WENCHEL, W
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within designation of portions of record, proceedings, and evidence to be contained in the record on review is hereby admitted and the portions so designated agreed to this 6th day of November, 1940.

(Signed) WALTER SLACK,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Nov. 13, 1940.

[39]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 39, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of Nov., 1940.

(Seal) B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9687. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Adolph B. Spreckels, Respondent. Transcript of the Record upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed November 25, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ADOLPH B. SPRECKELS,
Respondent.

Upon Petitions to Review Decisions of the
United States Board of Tax Appeals

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Clerk's Note: This case was submitted to the Court with companion cause, No. 9682, Spreckels vs. Commissioner, and the Circuit Court of Appeals rendered one appeal covering both causes. The consolidated proceedings are set forth in the printed record in said companion cause.]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9687

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ADOLPH B. SPRECKELS,
Respondent.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is reversed.

[Endorsed]: Filed and entered May 15, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul, P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-five (45) pages, numbered from and including 1 to and including 45, together with proceedings had in said Circuit Court of Appeals printed in transcript of record in companion cause No. 9682, Adolph B. Spreckels vs. Commissioner of Internal Revenue at pages 51 to 68, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of August, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8665)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No.

No.

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE;
Respondent.

PETITION FOR WRITS OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

WALTER SLACK,
Balfour Building, San Francisco, California,
Attorney for Petitioner.

Subject Index

Petition for Writs — Page

Summary statement of matter involved 1
Jurisdiction 2
Question presented 3
Reasons relied on for the allowance of the writs 3
Prayer of petition 4

Brief in Support of Petition

I. Opinions below 5
II. Jurisdiction 6
III. Statement of the case 6
IV. Specification of errors 8
V. Argument 9
A. Selling commissions are properly deductible as a business expense by one engaged in the business of buying and selling securities and commodities 9
1. Treasury regulations so provide 9
2. All authority prior to the present decision supported the deductibility of selling commissions on securities and commodities as a business expense 12
3. Deductibility of selling commissions as business expense cannot be restricted to dealers 14
4. Decision in Helvering v. Union Pacific Co. does not require holding that selling commissions are not deductible 17
B. Board's decision on 1934 appeal cannot be affirmed on ground not considered by Circuit Court of Appeals 20

Conclusion 22

Table of Authorities Cited

Cases	Pages
Beadleston, Appeal of Estate of C. Perry, B.T.A. memo. dec.	4, 14
Cities Service Oil Co. v. Dunlap, 308 U.S. 208	21
Commissioner v. Covington, 120 F. (2d) 768	3, 13
Covington, Appeal of George W., 42 B.T.A. 601	13
Helvering v. Fuller, 310 U.S. 69	21
Helvering v. New York Trust Co., 292 U.S. 455	17
Helvering v. Union Pacific R.R. Co., 293 U.S. 282	17, 18, 19
Helvering v. Winmill, 305 U.S. 79	13, 18, 19
Neuberger v. Commissioner, 311 U.S. 83	13
Neuberger v. Commissioner, 104 F. (2d) 649	3, 13
Neuberger, Appeal of Harry H., 37 B.T.A. 223	13
Ortiz, Appeal of Alice du Pont, 42 B.T.A. 173	4, 13
Prentice, Appeal of Bernon S., B.T.A. memo. dec.	4, 14
Skofield, Appeal of Ray L., B.T.A. memo. dec.	4, 14
Taylor, Appeal of Roland L., 44 B.T.A. No. 61	4, 14
Winmill v. Commissioner, 93 F. (2d) 494	3, 12
Winmill, Appeal of Robert C., 35 B.T.A. 804	12

Statutes	
Internal Revenue Code, sec. 1141	2, 6
Judicial Code, sec. 240	2, 6
Revenue Act of 1934:	
Sec. 23(a)	9, 10
Sec. 322	20, 21

Treasury Regulations	
Regulations 77:	
Article 121	18
Article 282	11, 12, 19

Regulations 86: Pages
Article 22 (c)-5 ..... 15, 16
Article 23 (a)-1 ..... 10, 18, 19, 20
Article 24-2 ..... 11, 12, 14, 16, 17, 19, 20
Regulations 103, sec. 19.24-2 11
General Counsel's Memorandum 16
G.C.M. 15430, XIV-2, Cum. Bull. 59 ..... 16, 17, 19

In the Supreme Court
OF THE
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OCTOBER TERM, 1941

No.

No.

ADOLPH B. SPRECKELS, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Adolph B. Spreckels, hereby petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit and respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED.

These causes arise in the determination of petitioner's income tax liability for the years 1934 and

1935. The Board of Tax Appeals determined that petitioner in each year was engaged in the business of buying and selling stocks, bonds and commodities for profit and that in computing his income tax he was entitled to deduct selling commissions on such sales as an expense of that business. As to the year 1934, the Board held that there had been no timely claim of the deduction and for that reason only refused to allow it. Petitioner petitioned the Circuit Court of Appeals for the Ninth Circuit for a review of the Board's determination as to the year 1934 (No. 9682). The Commissioner also petitioned that court for a review of the Board's determination that petitioner was entitled to the deduction in 1935 (No. 9687). The Circuit Court of Appeals in a single opinion affirmed the Board's decision as to 1934 and reversed it as to 1935, holding that petitioner was not entitled to deduct selling commissions in determining his income tax liability in either year, refusing, therefore, to consider the propriety of the decision of the Board as to the timeliness of the 1934 claim.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of section 1141 of the Internal Revenue Code, (U.S.C. Title 26, section 1141) and section 240 of the Judicial Code, (U.S.C. Title 28, section 347). The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit herein referred to is May 15, 1941. A petition for rehearing by that Court was denied July 28, 1941.

QUESTION PRESENTED.

A single question is presented by this petition, viz: Is one engaged in the business of buying and selling stocks, bonds and commodities for profit entitled, in determining his income tax liability, to deduct commissions necessarily paid by him in connection with such sales?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The decision of the Circuit Court of Appeals for the Ninth Circuit in the present case is in direct conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Winmill v. Commissioner,* 93 Fed. (2d) 494, and *Neuberger v. Commissioner,* 104 Fed. (2d) 649, both holding that selling commissions paid by a trader in securities are deductible. The conflict between the circuits extends also to the Circuit Court of Appeals for the Fifth Circuit, where the Court in *Commissioner v. Covington,* 120 Fed. (2d) 768 reversed the Board of Tax Appeals and held that a trader in commodity futures was not entitled to deduct selling commissions.

2. The question presented is of great importance and arises under all of the Revenue Acts commencing with the Revenue Act of 1932 and including the Revenue Act of 1940. The Board of Tax Appeals, since its decision on petitioner's appeals, has held selling commissions deductible in a number of appeals, several of which are pending on petition for review, one in the

Second Circuit and two in the Third Circuit. The question should be finally determined by this Court.

Appeal of Alice du Pont Ortiz, 42 B.T.A. 173, pending in the Third Circuit;

Appeal of Bernon S. Prentice, decided by the Board December 6, 1940, pending in the Third Circuit;

Appeal of Estate of C. Perry Beadleston, deceased, decided by the Board March 24, 1941, pending in the Second Circuit;

Appeal of Roland L. Taylor, Trustee, 44 B.T.A. No. 61;

Appeal of Ray L. Skofield, decided by the Board May 17, 1941.

Wherefore, petitioner respectfully prays that writs of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court full and complete transcripts of the record and all proceedings in the cases entitled and numbered on its docket, Adolph B. Spreckels v. Commissioner of Internal Revenue, No. 9682 and Commissioner of Internal Revenue v. Adolph B. Spreckels, No. 9687, to the end that the said cases may be reviewed and determined by this Court as provided by law, and that petitioner may have such action and further relief in the premises as to this Court may seem proper.

Dated, San Francisco, California,
August 27, 1941.

WALTER SLACK,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

No.

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 119 Fed. (2d) 667, and will be found in the Record at pages 52 to 65.* The opinion of the Board of Tax Appeals is reported in 41 B.T.A. 1204, and will be found in the record at pages 22 to 31.

*References are to the record in CCA cause No. 9682.

II.

JURISDICTION.

This Court has jurisdiction to issue the writs prayed for under the provisions of section 1141 of the Internal Revenue Code (U.S.C. Title 26, section 1141) and section 240 of the Judicial Code (U.S.C. Title 28, section 347).

The petition is timely, the judgments of the Circuit Court of Appeals here sought to be reviewed having been entered on May 15, 1941, and petitioner's petition for rehearing having been denied on July 28, 1941. (R. 67.)

The grounds upon which the jurisdiction of this Court is invoked are set out in the petition and are briefly that the Circuit Court of Appeals for the Ninth Circuit having determined that commissions paid on the sales of securities and commodities are not deductible as a business expense, a direct conflict exists with decisions of the Circuit Court of Appeals for the Second Circuit holding that such commissions are deductible and that the question of federal law involved is an important one which should be settled by this Court.

III.

STATEMENT OF THE CASE.

Petitioner, during the years 1934 and 1935, was engaged in the business of purchasing and selling stocks, bonds and commodities for profit. (R. 24.) In due

course he filed his income tax returns for the calendar years 1934 and 1935. Thereafter, the respondent, Commissioner, asserted deficiencies in tax for the two years upon grounds that are not here material. Petitioner filed petitions with the Board of Tax Appeals for redetermination of the asserted deficiencies. All errors raised in the original petitions were disposed of by stipulation prior to trial. At the hearing before the Board, petitioner asked and was granted leave to file amendments to his two petitions alleging that during each calendar year he had paid, in the conduct of his business, selling commissions on sales of stocks, bonds and commodities which he had not taken as deductions in computing his income tax for those years and asserted the right to have those deductions considered in determining his taxable income. (R. 23.) These claims, if conceded, resulted in the overpayment of his income tax for both years.

The two petitions were consolidated for hearing and were disposed of by the Board in a single opinion, although separate decisions were entered. The Board found the facts as above stated and held that the selling commissions were deductible as ordinary and necessary expenses of taxpayer's business, but, as to the year 1934, held that the amendment to the petition having been filed more than three years after the payment of the last installment of tax, a refund based upon the failure to claim a deduction for selling commissions was barred by the statute of limitations. (R. 27-31.)

Petitioner applied to the Circuit Court of Appeals for the Ninth Circuit for a review of the decision entered for 1934, while the Commissioner brought up the decision as to 1935. Both petitions were considered together by the Circuit Court of Appeals, the Court saying:

> "* * * The basic question before this court in each case is identical; only in the event that our conclusion on deductibility is in the taxpayer's favor will it be necessary to consider whether the claim for refund for 1934 was timely filed." (119 Fed. (2d) 669, R. 55.)

The Circuit Court of Appeals disposed of the petitions for review by reversing the decision of the Board for 1935 and by affirming its decision for 1934, "because the claimed additional refund was based upon selling commissions which we hold not deductible as expenses." (119 Fed. (2d) 672, R. 65.)

IV.

SPECIFICATION OF ERRORS.

The errors of the Circuit Court of Appeals relied upon in support of this petition are:

(1) The determination by that court that a person engaged in the business of buying and selling securities and commodities for profit is not entitled to deduct, as an expense of such business, commissions paid on sales;

(2) The failure of the court to consider and determine whether or not the Board of Tax Ap-

peals erred in refusing to give effect to selling commissions paid by petitioner in determining his income tax liability for the year 1934.

V.

ARGUMENT.

A. SELLING COMMISSIONS ARE PROPERLY DEDUCTIBLE AS A BUSINESS EXPENSE BY ONE ENGAGED IN THE BUSINESS OF BUYING AND SELLING SECURITIES AND COMMODITIES.

1. Treasury regulations so provide.

While the language of the Revenue Acts authorizing the deduction of business expenses is general, the Regulations have uniformly included commissions within the scope of the statutory provisions.

The Revenue Act of 1934, applicable to the years here under consideration, provides:

"Sec. 23. **Deductions from Gross Income.**

In computing net income there shall be allowed as deductions:

(a) **Expenses**—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business,

of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Article 23 (a)-1, Regulations 86, promulgated under the Revenue Act of 1934, expressly includes selling commissions in the definition of business expenses. The article so far as pertinent reads:

"Reg. 86, Art. 23 (a)-1. **Business expenses.**

Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business except the classes of items which are deductible under the provisions of articles 23 (b)-1 to 23 (q)-1. Double deductions are not permitted. Amounts deducted under one provision of the Act can not again be deducted under any other provision of the Act. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. (See article 22 (a)-5.) Among the items included in business expenses are management expenses, *commissions*, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 23 (a)-2), advertising and other *selling expenses*, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property." (Italics supplied.)

It will be noted that the article includes *commissions* and *other selling expenses* in the same category. Lan-

guage could scarcely be chosen more clearly expressing the thought that selling commissions are deductible as a business expense. It is claimed by the Commissioner that the general rule announced in the quotation from the Regulations is modified by a subsequent provision, viz.: Article 24-2, relating to capital expenditures, which so far as is material reads:

> "Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business expense,* are an offset against the selling price." (Italics supplied.)

The italicized portion of the quoted Regulation first appeared in Article 282, Regulations 77, adopted under the Revenue Act of 1932, but has continued unchanged through the successive revisions of the regulations and is now contained in Section 19.24-2 Regulations 103.

From the quoted provisions of the regulations it is clear that commissions paid in respect of the acquisition and sale of a stock in trade of a business are generally deductible, the only limitation expressed relating to commissions paid in connection with the *purchase and sale* of *securities.* Since in the case of *sales* of *securities,* commissions which are an ordinary and necessary business expense are exempted from the limitation, it follows petitioner's selling commissions on both *security and commodity* sales are deductible as the Board held.

2. All authority prior to the present decision supported the deductibility of selling commissions on securities and commodities as a business expense.

The Commissioner argued in the Court below and before the Board that selling commissions on *security* sales were a business expense only in the case of dealers, as distinguished from traders. This contention was upheld by the Board in the *Appeal of Robert C. Winmill,* 35 B.T.A. 804, the first case arising after the amendment to the regulations under the 1932 Act, the Board deciding that a trader in *securities* had no right to deduct either purchasing or selling commissions. On the taxpayer's petition for a review, the Circuit Court of Appeals for the Second Circuit, in *Winmill v. Commissioner,* 93 Fed. (2d) 494, reversed the Board, holding both purchasing and selling commissions deductible. After referring to Article 282 of Regulations 77 (identical with Article 24-2 of Regulations 86), the Court said (93 Fed. (2d) 496):

> "If the petitioner's activities in buying and selling amounted to a trade or business, his expenses would be deductible under section 23 (a), 26 U.S.C.A. §23 (a) and note, which allows 'all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.' This would apply to commissions paid in buying and selling securities. No good reason is advanced for a discrimination against dealers in securities. The statute makes no such discrimination."

The Commissioner applied for and was granted a writ of certiorari by this Court limited to a review of the Circuit Court of Appeals ruling on the deducti-

bility of *purchasing* commissions only. Necessarily the decision of this Court in *Helvering v. Winmill,* 305 U.S. 79, 83 L. ed. 52, 59 S. Ct. 45, reversing the Circuit Court of Appeals, was confined to a consideration of *purchasing* commissions, which as has been noted, are treated differently in the regulations. As a result the decision of the Circuit Court of Appeals that *selling* commissions are deductible as a business expense became final and has since been followed by the Board.

While the *Winmill* case was pending, the Board decided the *Appeal of Harry H. Neuberger,* 37 B.T.A. 223, and, on the authority of the decision of the Circuit Court of Appeals, allowed the deduction of both buying and selling commissions by a trader in securities. On the Commissioner's petition to review, *Neuberger v. Commissioner,* 104 Fed. (2d) 649, the Second Circuit reversed as to *buying* commissions but affirmed as to *selling* commissions, adhering to its decision in the *Winmill* case, on the latter point. The *Neuberger* case came before this Court on taxpayer's petition on another point (*Neuberger v. Commissioner,* 311 U.S. 83, 85 L. ed. Adv. Op., p. 16, 61 S. Ct. 97) but the Commissioner did not attempt to secure a review of the question as to the deductibility of selling commissions. Since the *Neuberger* decision, the Board has consistently ruled that *selling commissions* paid by traders in *securities* and in *commodities* are deductible. *Cf Appeal of George W. Covington,* 42 B.T.A. 601, (reversed by the Circuit Court of Appeals, Fifth Circuit, in *Commissioner v. Covington,* 120 Fed. (2d) 768), *Appeal of Alice du Pont Ortiz,* 42 B.T.A. 173 (pending

in the Third Circuit), *Appeal of Bernon S. Prentice,* decided December 6, 1940, unreported memorandum opinion (pending in the Third Circuit), *Appeal of Estate of C. Perry Beadleston, deceased,* decided March 24, 1941, unreported memorandum opinion, (pending in the Second Circuit), *Appeal of Roland L. Taylor, Trustee,* 44 B.T.A. No. 61, *Appeal of Ray L. Skofield,* decided May 17, 1941, unreported memorandum decision.

The Circuit Court of Appeals for the Ninth Circuit declined to follow the decisions of the Circuit Court of Appeals for the Second Circuit in the *Winmill* and *Neuberger* cases on two grounds, viz.: (1) that selling commissions were not a necessary business expense of *traders* as distinguished from dealers, and (2) that the Court found "no compelling reason * * * for treating purchasing commissions, concededly nondeductible as expenses, differently from selling commissions." These two grounds will be analyzed and answered in order.

3. Deductibility of selling commissions as business expense cannot be restricted to dealers.

As will have been noted, the applicable statutory provisions and regulations make no attempt to limit the deduction of selling commissions to any specific business. Regulations 86, Article 24-2 applies only to selling commissions on *securities,* whereas the petitioner's business also included sales of *commodities,* but even as to security sales, it expressly exempts from its limitations, selling commissions which are

"an ordinary and necessary business expense." The Board found that "petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit" (R. 24), that "he paid to brokers selling commissions in connection with such sales" (R. 24) and concluded "that selling commissions are allowable deductions." (R. 26.) These findings and the conclusions drawn by the Board would seem to determine the question since the evidence upon which they were based was not brought up. However, the Commissioner successfully argued to the Circuit Court of Appeals, as a matter of law, that since the Board referred to petitioner as a *trader*, the commissions could not be an ordinary and necessary expense of such business, but only of the business of a *dealer*.

Article 22 (c)-5, Regulations 86, defines a "dealer in securities" as "a merchant of securities * * * with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. * * * Taxpayers who buy and sell or hold securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business * * * are not dealers in securities within the meaning of this rule." The article is otherwise devoted to providing for the permissive use of inventories by dealers in securities and in no wise suggests that they are authorized to make a different treatment of selling commissions than traders in securities.

The only support for the Commissioner's position is found in G.C.M. 15430, XIV-2 Cumulative Bulletin 59, which briefly holds that selling commissions are a necessary business expense only where accounting practices make it difficult or impracticable to charge such commissions against individual sales, that such difficulty or impracticability can arise only in the case of dealers and therefore that such commissions are deductible only by that class. Regardless of the propriety of restricting business expenses by the ease or difficulty of accounting practices, the applicability of the memorandum to the present case rests entirely on the Commissioner's *ipse dixit,* since the record is devoid of any evidence of the accounting practices of dealers as distinguished from those of traders.

There seems to be no fundamental distinction, so far as commissions are concerned, between dealers and traders. Both are in the business of buying and selling for profit. The dealer apparently deals directly with his customers, the trader only through a broker. It is difficult to see where a dealer, within the strict definition of Article 22 (c)-5, would have any "selling commissions", since if he ceased to deal directly with his customers and sold through a broker he would cease to be a dealer.

The opinion of the Circuit Court of Appeals refers to the *regulations* as seeming to indicate that the modifying clause of Article 24-2 applies only to "dealers in securities." (119 Fed. (2d) 671, R. 61.) However, as already noted, this inference can only be drawn from the General Counsel's Memorandum. This Court has

pointed out that these memoranda "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." *Helvering v. New York Trust Co.*, 292 U.S. 455, 468, 78 L. ed. 1361, 1368, 54 S. Ct. 806. It is submitted that the regulations themselves making no discrimination as to the deductibility of selling commissions as between dealers and traders, there is no authority for such discrimination merely on a real or fancied accounting difficulty.

It should also be noted that G.C.M. 15430 is concerned with sales of *securities*, as is Article 24-2, and furnishes no authority for a denial of selling commissions on sales of *commodities*, both of which are involved in the present case.

4. Decision in Helvering v. Union Pacific Co. does not require holding that selling commissions are not deductible.

While giving considerable weight to the assumed distinction between dealers and traders, the Court below concludes its opinion with a discussion of the *Winmill* and *Neuberger* cases and the case of *Helvering v. Union Pacific Railroad Company*, 293 U.S. 282, 79 L. ed. 363, 55 S. Ct. 165, and says (119 Fed. (2d) 672, R. 64):

> "No compelling reason, however, presents itself to us for treating purchasing commissions, concededly non-deductible as expenses, differently from selling commissions. If the purchase commissions are to be regarded as a part of the cost of the securities, then, logically, the selling commissions should be considered as an offset against the sale price. * * * The Supreme Court has never

passed squarely upon the precise question here before us, but it has shown a disposition to adhere to the reasoning expressed in the *Union Pacific* case, supra, and until that language, heretofore quoted, is repudiated or overruled, we feel obliged to hold that selling commissions, except in the case of a dealer in securities, are not deductible as expenses, but must be considered as an offset against selling prices."

This Court, in its decision in the *Winmill* case, quoted with approval from the decision in *Helvering v. Union Pacific Railroad Company,* a statement to the effect that the consistent treatment by the regulations of commissions paid for marketing bonds not as items of current expense but as deductions from the proceeds of sale, coupled with the reenactment of the statutory provisions without change, had the effect of establishing that treatment as law and so held that the regulations required the disallowance of purchasing commissions on securities as an item of expense. In so holding, the Court said, in response to the suggestion of inconsistency between that result and the provision in Regulation 77, Article 121 (Reg. 86, Art. 23 (a)-1) including "commissions" among items of business expenses:

> "Special provisions limit the application of those of a broad and general nature relating to the same subject. The special designation of security purchase commissions as a 'part of the cost price of such securities' contained in Article 282 evinces the clear intent to withdraw that special type of commission from the general classification of Article 121." (305 U.S. 83; 83 L. ed. 55; 59 S. Ct. 45.)

This very line of reasoning compels the conclusion that the Circuit Court of Appeals for the Second Circuit and the Board are right in allowing selling commissions as a business expense, since the *special provision* of Article 24-2, (Reg. 77, Art. 282) requiring purchasing commissions to be added to the cost of securities purchased and selling commissions to be deducted from the selling price of such securities, *expressly excludes from the requirement as to selling commissions when they are an ordinary and necessary business expense.* This has the effect of eliminating the special provisions of Article 24-2 from consideration in determining whether or not such selling commissions are deductible, and they thereby fall in the general classification of commissions deductible under Section 23 (a)-1. Applying to this situation this Court's reasoning in the *Union Pacific* and *Winmill* cases, it necessarily follows that selling commissions are a business expense. The regulations, commencing with the 1932 Act, having consistently so treated such commissions, and the pertinent provisions of the 1932 Act having been reenacted in the Revenue Act of 1934 and subsequent Revenue Acts, such treatment is "deemed to have received congressional approval and have the effect of law." (305 U.S. 83, 83 L. ed. 55, 59 S. Ct. 47.)

It should also be noted that Article 24-2 and G.C.M. 15430 apply only to sales of securities and that the selling commissions found by the Board to be deductible by petitioner as a business expense include both commissions on sales of securities and commissions on

sales of commodities. (R. 24.) The limiting provisions of Article 24-2, applying only to sales of securities, the general classification of Article 23 (a)-1 should apply to sales of commodities and such commissions must be allowed as a business expense under the authority of the latter regulation regardless of the effect of the regulations relating to commissions on sales of securities. As the Board's findings make no segregation as between commissions paid on security or commodity sales, and the Commissioner did not bring up a record from which such segregation could be made, it is obvious that the Board's decision must be sustained if commissions on the sales of either securities or commodities are deductible as a business expense.

B. BOARD'S DECISION ON 1934 APPEAL CANNOT BE AFFIRMED ON GROUND NOT CONSIDERED BY CIRCUIT COURT OF APPEALS.

Although the Board found for petitioner on the deductibility of selling commissions as a business expense, it refused to take them into consideration in determining petitioner's liability for 1934 on the ground that any claim for a refund of taxes on account thereof was barred by section 322 of the Revenue Act of 1934. Petitioner sought a review of this decision by the Circuit Court of Appeals but that Court declined to consider it, basing its affirmance on its conclusion that the commissions were not items of business expense.

The contention as to 1934 was briefly that as petitioner had filed a valid and timely claim for refund

for income tax paid for that year which the Commissioner had attempted to offset by other claimed errors, petitioner was authorized to have considered by the Board in determining his income tax liability, any errors entering into its determination and properly assigned in the proceeding, even though the pleading assigning such error had been filed after the expiration of the time for filing a refund claim. Petitioner contends that the limitation contained in section 322, applies only after the Board had found that there had been an overpayment of income tax for a given year, in which event the amount refundable is limited to the portion of the overpayment covered by a timely and valid refund claim.

To be specific, if petitioner is entitled to deduct selling commissions paid in 1934, he has overpaid his income tax for that year by $15,122.56. The portion of that amount refundable, however, is limited to $4,087.61, the amount covered by a timely and valid refund claim based on petitioner's failure to deduct on his return an amount paid for stamp taxes. The Board, however, limited the refund to $2,816.72.

The point will not be further elaborated in this brief, since, if this Court holds that selling commissions are deductible as a business expense, the correctness of the Board's decision as to 1934, will be a matter for the consideration of the Circuit Court of Appeals when the cause comes again before it.

Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 212; 84 L. ed. 196, 198; 60 S. Ct. 201, 203;
Helvering v. Fuller, 310 U.S. 69, 76; 84 L. ed. 1082, 1086, 60 S. Ct. 784, 787.

CONCLUSION.

Petitioner's application for writs of certiorari to review the decision of the Circuit Court of Appeals for the Ninth Circuit that selling commissions are not a deductible expense of one engaged in the business of buying and selling securities and commodities should be granted for the following reasons:

First: A direct conflict exists between that decision and the decisions of the Circuit Court of Appeals for the Second Circuit in the *Winmill* and *Neuberger* cases.

Second: The question as to the deductibility of selling commissions as a business expense has never been determined by this Court and should be authoritatively decided since it arises under all of the Revenue Acts commencing with the Revenue Act of 1932 and has been the subject of numerous decisions by the Board of Tax Appeals.

Third: Under a proper reading of the applicable provisions of the Revenue Acts and the Regulations, selling commissions on securities and commodities are proper deductions by one engaged in the business of buying and selling securities and commodities for profit.

Dated, San Francisco, California,
August 27, 1941.

Respectfully submitted,
WALTER SLACK,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 581.
No. 582.

ADOLPH B. SPRECKELS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

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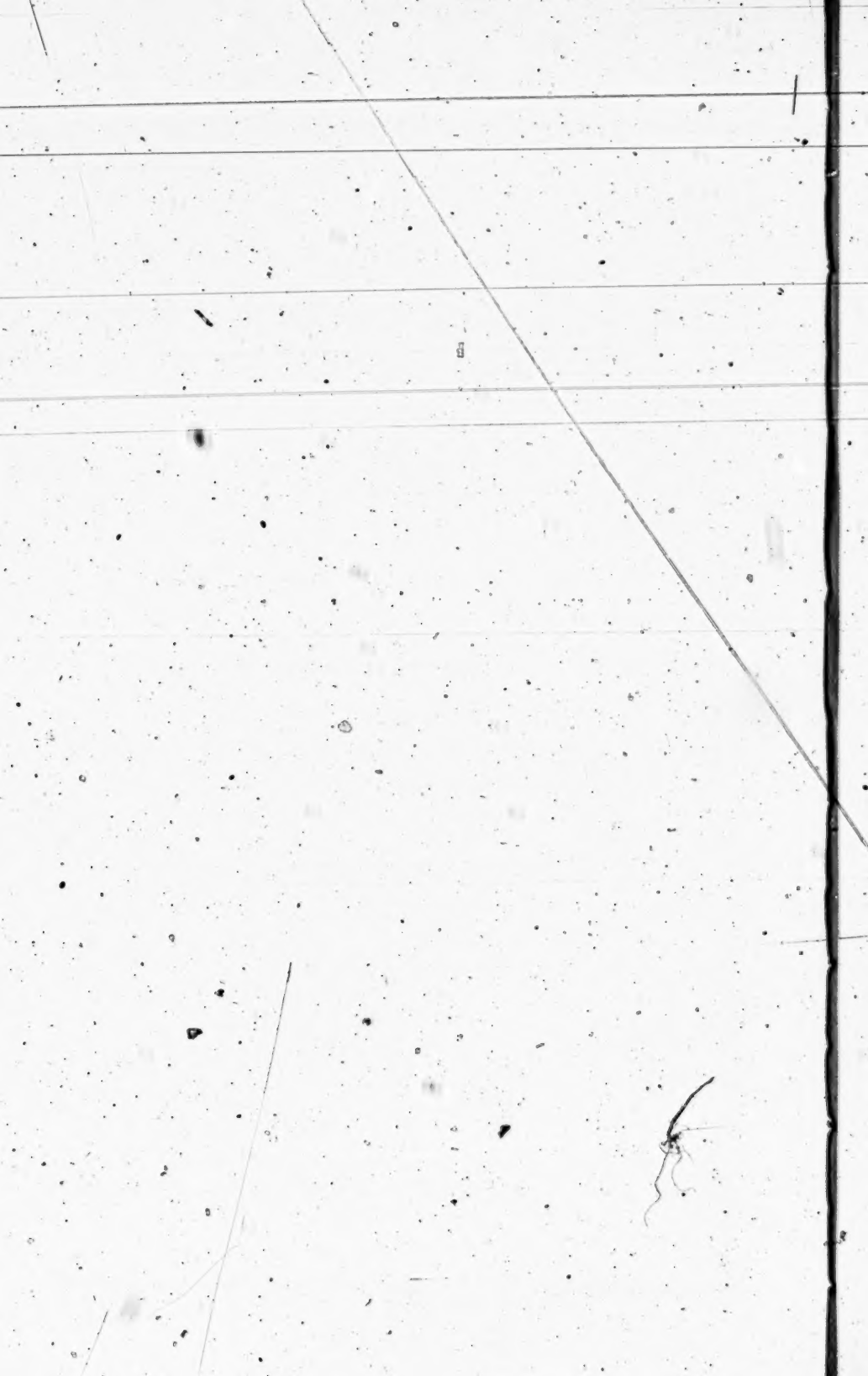

INDEX.

Opinions below 1

Jurisdiction 1

Question Presented 2

Statute and Regulations Involved 2

Statute 2

Regulations 3

Statement 4

Argument: 5

A taxpayer engaged in the business of purchasing and selling stocks, bonds and commodities for profit during the years 1934 and 1935 is entitled to deduct the selling commissions, incident to the said sales of securities and commodities as "compensation for personal services actually rendered."

Conclusion 27

CITATIONS.

Cases:

Biddle v. Commissioner, 302 U. S. 574, 582 ..... 25, 26

Brewster v. Walsh, 268 Fed. 207, 209 18

Burnet v. Thompson Oil & Gas Co., 283 U. S. 301, 304 19

Caminetti v. United States, 242 U. S. 470 26

Central Real Estate Co. v. Commissioner, 47 Fed. (2d) 1036, 1037 12

Colony Coal & Coke Corp. v. Commissioner, 52 Fed. (2d) 923 15

Commissioner v. Covington, 120 Fed. (2d) 768, 771 ..23, 24

Dart v. Commissioner, 74 Fed. (2d) 845, 847 15

De Ganey v. Lederer, 250 U. S. 376, 381 26

Deputy v. Du Pont, 308 U. S. 488, 495, 60 S. Ct. 363, 367 15

Ex Parte Public National Bank, 278 U. S. 101 26

Goodrich v. Edwards, 255 U. S. 527, 534 ..... 17, 18

Haggar Co. v. Helvering, 308 U. S. 389, 400 17

Helvering v. Horst, 311 U. S. 112, 116, 61 S. Ct. 144, 147 19

Page

Helvering v. Independent Life Ins. Co., 292 U. S. 371, 381 19
Helvering v. New York Trust Co., 292 U. S. 455, 467, 468, 469 ..... 17, 25, 26
Helvering v. Union Pacific Railroad Co., 293 U. S. 282, 285 ..... 11, 23
Helvering v. Winmill, 305 U. S. 79, 59 S. Ct. 45 ..... 8, 9, 10, 11, 13, 19, 22, 23
Helvering v. Winmill, No. 860, October Term 1937, Trans. p. 10 22
Helvering v. Winmill, No. 11, October Term 1938, Petitioners Main Brief p. 3 ..... 8, 22
Higgins v. Commissioner, 312 U. S. 212, 61 S. Ct. 475 25
Highlands Trust, The, No. 1546, 32 B. T. A. 760 (6-12-35) 20
Kornhauser v. United States, 276 U. S. 145 21
Lake County v. Rollins, 130 U. S. 662, 670 26
Merchants' Loan & Trust Co. v. Smietanka, 255 U. S. 509, 519 ..... 17, 18
New Colonial Ice Co. Inc. v. Helvering, 292 U. S. 435, 440 19
Spreckels v. Commissioner, 41 B. T. A. 1204 1
Spreckels v. Commissioner, 119 Fed. (2d) 667 ..... 1, 5, 8
Sprunt, Alexander & Son, Inc. v. Commissioner, 64 Fed. (2d) 424, 428 21
United States v. Colorado & N. W. R. Co. (C. C. A.) 157 F. 321, 327 26
United States v. Fisher, 2 Cranch, 358, 386 26
United States v. Missouri Pacific Railroad Co., 278 U. S. 269, 277 26
United States v. Wiltberger, 5 Wheat. 76, 95-96 26
Walsh v. Brewster, 255 U. S. 536, 538 ..... 16, 17, 18
Walsh v. Brewster, p. 14, No. 742, October Term, 1920 18
Whitman, Clarence, v. Commissioner, 16 B. T. A. 197, 199, Aff'd. C. C. A. 2, 49 F. 2d 1087 21
Winmill, Helvering v., 305 U. S. 79 ..... 8, 9, 10, 11, 13, 19, 22, 23
Winmill v. Helvering, 93 Fed. (2d) 494 22

CONGRESSIONAL COMMITTEE REPORTS:

Senate Finance Committee Report, 67th Cong. 1st Sess., S. Rep. 275, p. 10 18

Page

Senate Finance Committee Report, 68th Cong. 1st Sess., S. Rep. 398, p. 13 17
Ways and Means Committee Report, 67th Cong. 1st Sess., H. Rept. 350, p. 9 18
Ways and Means Committee Report, 68th Cong. 1st Sess., H. Rept. 179, p. 12 ..... 12, 16

INTERNAL REVENUE RULINGS:

I. T. 2305 C. B. V-2, p. 108 ..... 13, 14, 20, 21
G. C. M. 15430, C. B. XIV-2, p. 59 ..... 7, 10, 14, 23, 24, 25

MISCELLANEOUS:

Kester, Roy B., Advanced Accounting—Third Edition, p. 13 12
Ann. Cas. 1917B, 1168 26
L. R. A. 1917F, 502 26
13 Ann. Cas. 893 26
15 L. R. A. (N. S.) 167 26

TREASURY DEPARTMENT REGULATIONS:

Regulations 33, Article 116 17
Regulations 45, Article 292 10
Regulations 62, Article 293 10
Regulations 65, Article 292 10
Regulations 69, Article 292 10
Regulations 74, Article 282 10
Regulations 77, Article 121 ..... 8, 9, 22
Regulations 77, Article 282 ..... 8, 9, 10, 11, 21, 23
Regulations 86, Article 23 (a)-1 ..... 3, 7
Regulation 86, Article 24-2 ..... 7, 10, 13
Regulations 94, Article 24-2 ..... 4, 7, 10
Regulations 101, Article 24-2 10
Regulations 103, Sec. 19, 24-2 10

INTERNAL REVENUE LAWS: (U. S. C. A. Title 26)

Revenue Act of 1921, Section 202 (b) (1), (2), (3) (42 Stat. L. 227, C. 136) 17, 18
Revenue Act of 1924 (43 Stat. L. 253, C. 234), Section 202 (a) 12, 16
Section 202 (c) 12, 16

Page

Revenue Act of 1926, Section 214 (a)(1) (44 Stat. L. 2 C. 27) 15
Revenue Act of 1928, Section 23 (45 Stat. L. 791, C. 852) 15
Revenue Act of 1932, Section 23 (r) (47 Stat. L. 169, C. 209) 10, 11
Revenue Act of 1934, (48 Stat. L. 680, C. 277),
Section 23 (a) 2, 6, 13, 14, 26
Section 111 (a), (b) 2, 7, 13, 16, 20, 21
Section 113 (b) 3, 7, 13, 17, 19, 21
Section 113 (b) (1) (A).....3, 8, 13, 19, 22
Revenue Act of 1936 (49 Stat. L. 1648, C. 690) 13
Revenue Act of 1938 (52 Stat. L. 447, C. 289) 13

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion in the Board of Tax Appeals (R. 26 to 31 in No. 581 and R. 22 to 28 in No. 582) is reported in 41 B. T. A. 1204. The opinion of the Circuit Court of Appeals (R. 52 to 65 in No. 581) is reported in 119 Fed. (2d) 667.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered May 15, 1941 in both proceedings. (R. 66 in No. 581 and R. 45 in No. 582) Timely petition for rehearing in both causes by that Court was denied July 28, 1941. (R. 67 in No. 581) The petition for a writ of cer-

tiorari was filed on September 3, 1941 and was granted on October 20, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925. (U. S. C. Title 28, Section 347)

QUESTION PRESENTED.

Whether a taxpayer who is engaged in the business of buying and selling securities and commodities for profit is entitled in the determination of his income tax liability to deduct commissions necessarily paid by him in connection with such sales.

STATUTE AND REGULATIONS INVOLVED.

Statute:

Revenue Act of 1934, C. 277, 48 Stat. 680:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered: * * * 26 U. S. C. A.

* * * * * * * * * *

Sec. 111. Determination of Amount of, and Recognition of, Gain or Loss.

(a) Computation of Gain or Loss.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount realized.—The amount realized from the sale or other disposition of property shall be the sum

of any money received, plus the fair market value of the property (other than money) received.

• • • • • • • • • • •

Sec. 113. Adjusted Basis for Determining Gain or Loss.

• • •

(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(b) (1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years • • •. 26 U. S. C. A.

• • • • • • • • • • •

Regulations:

Reg. 86, Art. 23 (a)-1. Business expenses.

Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 23 (b)-1 to 23 (q)-1. Double deductions are not permitted. Amounts deducted under one provision of the Act can not again be deducted under any other provision of the Act. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. (See article 22 (a)-5.) Among the items included in business expenses are management expenses, *commissions*, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 23 (a)-2),

advertising and other *selling expenses*, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property." * * * (Italics supplied.)

Art. 24-2. Capital expenditures.

Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are not deductible from gross income. (See section 23 (1).) Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. The amount expended for architects' services is part of the cost of the bulding. Commissions paid in purchasing securities are a part of the cost price of such securities. *Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price.* * * * (Italics supplied)

STATEMENT.

Petitioner, during the years 1934 and 1935, was engaged in the business of purchasing and selling stocks, bonds and commodities for profit. (R. 24) In due course he filed his income tax returns for the calendar years 1934 and 1935. Thereafter, the respondent, Commissioner, asserted deficiencies in tax for the two years upon grounds that are not here material. Petitioner filed petitions with the Board of Tax Appeals for redetermination of the asserted deficiencies. All errors raised in the original petitions were disposed of by stipulation prior to trial. At the hearing before the Board, petitioner asked and was granted leave to file amendments to his two petitions alleging that during each calendar year he had paid, in the conduct of his business, selling commissions on sales of stocks, bonds and commodities which he had not taken as deductions in computing his

income tax for those years and asserted the right to have those deductions considered in determining his taxable income. (R. 23) These claims, if conceded, resulted in the overpayment of his income tax for both years.

The two petitions were consolidated for hearing and were disposed of by the Board in a single opinion, although separate decisions were entered. The Board found the facts as above stated and held that the selling commissions were deductible as ordinary and necessary expenses of taxpayer's business, but, as to the year 1934, held that the amendment to the petition having been filed more than three years after the payment of the last installment of tax, a refund based upon the failure to claim a deduction for selling commissions was barred by the statute of limitations. (R. 27-31)

Petitioner applied to the Circuit Court of Appeals for the Ninth Circuit for a review of the decision entered for 1934, while the Commissioner brought up the decision as to 1935. Both petitions were considered together by the Circuit Court of Appeals, the Court saying:

> "* * * the basic question before this court in each case is identical; only in the event that our conclusion on deductibility is in the taxpayer's favor will it be necessary to consider whether the claim for refund for 1934 was timely filed." (119 Fed. (2d) 669, R. 55, No. 581)

ARGUMENT.

A taxpayer engaged in the business of purchasing and selling stocks, bonds and commodities for profit during the years 1934 and 1935 is entitled to deduct the selling commissions, incident to the said sales of securities and commodities as "compensation for personal services actually rendered."

The Board of Tax Appeals found as a fact in both No. 581 and No. 582 that "petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit." (R. 24 as to No. 581, R. 21 as to 582) In-

asmuch as there is nothing in the record inconsistent with this finding or which would cast the slightest suspicion upon its correctness, it is completely out of order to question that finding of fact for the first time in the Supreme Court of the United States.

It must be assumed, therefore, that this taxpayer was engaged in a "trade or business" when he bought and sold securities and commodities for his own account during the years 1934 and 1935.

Under Section 23 of the Revenue Act of 1934.

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for * * * compensation for personal services actually rendered."

"shall be allowed as deductions" in computing net income.

Obviously, the brokerage commissions paid by the petitioner during the taxable years involved on the sales of securities and commodities constitute "compensation for personal services actually rendered." Obviously further, these brokerage commissions were "paid or incurred during the taxable year in carrying on any trade or business." That is, they were paid or incurred during the taxable year in carrying on the taxpayer's "business of purchasing and selling stocks, bonds and commodities for profit." (R. 24 as to No. 581 and R. 21 as to No. 582)

If these brokerage commissions constitute "ordinary and necessary expenses" incurred in petitioner's said business, they are deductible in computing his net income, unless by some other more specific provision of the statute these expenses are *clearly* to be treated otherwise.

Petitioner was engaged in a business in which selling stocks, bonds and commodities was necessary, and in order adequately to facilitate this selling in appropriate volume and with reasonable promptness, petitioner found it necessary to pay these expenses. It is the normal and common practice and hence ordinary for persons engaged in the business of buying and selling stocks, bonds and commodities

for profit, to use the facilities of the New York, Chicago or other stock exchanges and to pay the standard compensation fixed for these necessary services.

Article 23 (a)-1 of Regulations 86 dealing with "business expenses" states in part,

> "Among the items included in business expenses are management expenses, commissions, * * * selling expenses, * * * etc."

In reversing the holding of the United States Board of Tax Appeals that this compensation constituted ordinary and necessary business expenses, the lower court found that the above quoted provision of Article 23 (a)-1 must be read in conjunction with the provisions in Article 24-2 of Regulations 86 wherein it is provided that

> "Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price."

After referring to G. C. M. 15430, C. B. XIV-2, page 59, it expressed the belief that only in the case of a "dealer in securities" as distinguished from a "trader" could "commissions paid in selling securities be ordinary and necessary business expenses."

The Court ignores completely the fact that not only was petitioner engaged in the business of buying and selling *stocks* and *bonds*, but petitioner's business also consisted of buying and selling *commodities* for profit. Obviously this negative reference in Article 24-2, which relates primarily to *capital expenditures*, and specifically to "commissions paid in selling *securities*," can have no bearing upon commissions paid in selling *commodities*. Consequently that part of the Regulations (Article 23 (a)-1 relating to "commissions" and "selling expenses" must govern the commissions applicable to petitioner's *commodity* sales, in the absence of any more specific reference to such commissions. Furthermore, in the light of the Statute (Sec. 111 and Sec. 113) and the Regulations (Art. 23 (a) (1)), in the absence of any provision in the Regulations *specifically* or

even *inferentially* holding *security selling commissions* paid in carrying on the business of buying and selling stocks, bonds and commodities for profit, *not* to be an ordinary and necessary business expense, such commissions are not withdrawn from the general classification of Article 121, but remain deductible under its provisions.

The lower court concluded its opinion with the following argument:

> "No compelling reason, however, presents itself to us for treating purchasing commissions, concededly non-deductible as expenses, differently from selling commissions. If the purchase commissions are to be regarded as a part of the cost of the securities, then, logically, the selling commissions should be considered as an offset against the sale price." 119 Fed. (2d) 672, R. 64.

This negative approach ignores the reason which prompted this Court to hold purchasing commissions to be regarded as part of the cost, rather than ordinary and necessary business expenses.

In asking this Court in the *Winmill* case to hold that brokerage purchase commissions constitute "part of the cost price of securities," under the statutory definition of "cost," the Government quoted in its brief for the petitioner and relied upon Section 113 (b) (1) (A) which requires the inclusion in cost of "items, properly chargeable to capital account." (Page 3, petitioner's main brief, No. 11, October Term 1938.) *Helvering* v. *Winmill*, 305 U. S. 79.

This Court, accordingly, held brokerage buying commissions to be "an element of the cost of securities," quoting in the margin of its opinion that part of the statutory definition of "cost" (Section 113 (b) (1) (A)) requiring the inclusion therein of "items, properly chargeable to capital account." This Court also quoted from that part of Article 282 of Regulations 77, "which specifically and particularly declares that 'commissions paid in purchasing securities are a part of the cost price of such securities.'".

It was these latter "special provisions" which this Court held to limit the application of the broader term "commissions" as used in Article 121 in defining "business expenses."

This Court said specifically that

> "The special designation of security purchase commissions as 'part of the cost price of such securities' contained in Article 282 evinces the clear intent to withdraw that special type of commission from the general classification of Article 121." 305 U. S. 79, 83, 84.

On the basis of these particular statutory provisions and provisions of the Treasury Regulations, this Court held that these "interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." 305 U. S. 79, 83.

No such statutory authority or authority of Treasury Regulations or interpretations long-continued, exist in the instant case consistent with the position now taken by the Government to regard the business expenses in the instant case as not coming within the clear statutory provisions for their treatment as ordinary and necessary business expenses.

It is not enough to say that because "purchase commissions are to be regarded as a part of the cost of securities, then, logically, the selling commissions should be considered as an offset against the sales price."

Obviously the clear language of the statute and the regulations quoted above, which is limited to only such purchase commissions, cannot be so construed as to include as well selling commissions on securities, which are otherwise specifically provided for and selling commissions on *commodities* which are nowhere provided for in the regulations, so as to render inapplicable the specific words of the statute following a specious application of logic predicated merely on a supposed analogy between buying commissions and selling commissions.

G. C. M. 15430, relied upon by the lower court to support this view, does not represent a long-continued construction of law and regulations by administrative officers charged by the enforcement thereof.

This ruling is a mere opinion of the law officer of the Bureau of Internal Revenue which was rendered while the *Winmill* matter was in litigation, and at a time several years after Article 282 of Regulations 77 (promulgated under the Revenue Act of 1932) appeared including for the first time the modification impliedly permitting the deduction of commissions paid in selling securities when such commissions are ordinary and necessary business expenses.

This part of the regulations, as modified, commencing with the regulations under the 1932 Act reads as follows:

> "Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business expense,* are an offset against the selling price." (the words in italics were added for the first time after the enactment of Sec. 23 (r) of the 1932 Act.)

See also Article 24-2, Regulations 86 (under the Revenue Act of 1934), Regulations 94 (under the Revenue Act of 1936), Regulations 101 (under the Revenue Act of 1938), Section 19.24-2, Regulations 103 (under the Internal Revenue Code).

Prior to Regulations 77 the corresponding language of the Regulations read merely as follows:

> "Commissions paid in selling securities are an offset against the selling price." See Article 292, Regulations 45, Article 293, Regulations 62, Article 292, Regulations 65, Article 292, Regulations 69 and Article 282, Regulations 74.

The occasion for this modification of these regulations coincided with the change in the law adopted for the first time in Section 23 (r) of the 1932 Act limiting the losses on sales or exchanges of stocks and bonds which are not "capital assets," to the extent of the gains from such sales or exchanges.

Under the revenue act of 1932, therefore, when losses sustained in security transactions were for the first time limited by the provisions of Section 23 (r) of the Revenue Act of 1932, then, for the first time, it became no longer *immaterial* how these commissions were treated. Then it was for the first time also that the Commissioner modified the regulations to the effect that selling commissions were an offset to the selling price by adding (in Article 282, Regulations 77) the phrase "when such commissions are not an ordinary and necessary business expense."

Under all these circumstances, therefore, the reference by this Court in the *Winmill* case to that part of its opinion in *Helvering* v. *Union Pacific Railroad Co.*, 293 U. S. 282, 286, 55 S. Ct. 165, 167, regarding these *former* regulations as to the handling of brokerage *selling* commissions, cannot fairly be construed as an approval of the former regulations as to *selling* commissions, as applied to securities sold in the course of one's trade or business *after the law was changed*. This limitation of stock losses was such a substantial change in the Revenue Act as to warrant the modification of Article 282 of Regulations 77 as to selling commissions. In the *Union Pacific* case this Court obviously was primarily concerned to see that the taxpayer got the deduction in one way or another. Under the circumstances involved in that case and under the law as it then existed, it was *immaterial* whether commissions were deducted as a deferred expense or were offset against the issuing price.

In limiting its decision in the *Winmill* case to the question of the deductibility of broker's *purchase* commissions, this Court said (at page 84 of 305 U. S. and 47 of 59 S. Ct.):

> "This new statutory restriction of the allowance for losses from sales of stock bears no such relationship to the *definition of cost price* (Sec. 113) of securities as to lead to the conclusion that Congress intended to overthrow and abandon a settled practice of determining the *elements of cost*." (Emphasis ours)

There is nothing in the *"definition of cost price"* contained in Section 113 of the Revenue act constituting broker's *selling* commissions an "element of cost". The only statutory authority for deducting such selling commissions was as an ordinary and necessary expense. Selling commissions were never allowable under the statute as one of the "elements of cost." Yet prior to 1932 selling commissions always had been recognized as currently deductible. To say that they were an offset to selling price does not make them analogous to buying commissions, which are made "elements of cost" by the statutory language "properly chargeable to capital account." This language has no application to *selling* commissions and for this reason selling commissions are fundamentally different from buying commissions.

Of the words "properly chargeable to capital account" it has been held that they clearly contemplate only "such items as add to the value of property." *Central Real Estate Company* v. *Commissioner*, 47 Fed. (2d) 1036, 1037.

The words "properly chargeable to capital account" were used for the first time in the federal income tax law in Section 202 of the Revenue Act of 1924. When this new language was being adopted, the report of the Ways and Means Committee (68th Cong., 1st Sess., H. Rept. 179, pages 12 and 13) explained that:

> "Under this provision capital charges, such as improvements, and betterments, and carrying charges, such as taxes on unproductive property, are to be added to the cost of the property in determining the gain or loss from its *subsequent sale*, and items such as depreciation and obsolescence previously allowed with respect to the property are to be subtracted from the cost of the property in determining the gain or loss from its *subsequent sale*." (Italics supplied)

The definition of capital and revenue expenditures, in so far as material here will be found in *"Advanced Accounting"* by Roy B. Kester, Third Edition, page 13. It reads as follows:

"Capital expenditures may be defined as expenditures of funds or other assets on capital account. *In accounting language, they may be said to be those expenditures which result in charges to some asset account.*" (Emphasis ours)

On the basis of this generally recognized definition of capital charges, how can it be said that *selling commissions* result in charges to any capital account? Obligations to pay the selling commissions do not arise until the capital asset has been disposed of and the account has disappeared from the books. By no stretch of the imagination are selling commissions *capital expenditures* or charges, nor are they items "properly chargeable to capital account." They are ordinary and necessary expenses of carrying on the trade or business of buying and selling securities. Furthermore, the Commissioner's Regulations 86, Article 24-2, at the very outset define "capital expenditures" as: "Amounts paid for increasing capital value." These are the universally recognized accounting rules with respect to capital expenditures. When later in that Article it is said "commissions paid in selling securities, *when such commissions are not ordinary and necessary business expenses,* are an offset against the selling price," it does not mean that to offset against the selling price is to capitalize an item. See IT 2305 page 20, *infra.* If the Commissioner had thought that "an offset against the selling price" was a *capital* item, he would have said so, at that point in his regulations, but he avoided any such assertion in his article on "capital expenditures."

The subsequent reenactment without substantial change in this regard of the Revenue Acts of 1934, 1936, 1938, etc. has given tacit congressional approval to the modification of Art. 282 Regs. 77, Art. 24-2 Regs. 86, 94, 101 and 103, and gives recognition to the view that selling commissions frequently are ordinary and necessary expenses of doing business and as such are deductible. This added language is not idle language, it was placed in the Regulations as a

modification thereof for the purpose of giving recognition to the obvious fact that *selling* commissions are not "properly chargeable to capital account," but are ordinary and necessary business expenses in certain cases. There is nothing in the *Winmill* case to the contrary. This present case is certainly one of those intended to be covered by the modification and it cannot be distinguished on any moral, economic or legal ground from the situation of the brokerage selling commissions of a "dealer in securities."

It certainly never was the consistent practice of the Bureau of Internal Revenue to offset selling commissions on property sold in the course of one's trade or business. Quite on the contrary, it has been the long established custom of the Bureau of Internal Revenue to allow selling commissions as deductions when such commissions are paid with respect to *property* sold in the course of a trade or business of the taxpayer. This practice is evidenced by the Commissioner's published ruling which is still in force, namely, I. T 2305, quoted on page 20 of this brief.

In the case of casual sales of "stocks and bonds" not sold in the course of a trade or business carried on by the taxpayer, such commissions were not ordinary and necessary expenses of doing business, but in the case of a person engaged in the business of buying and selling stocks and bonds and commodities, a distinction was justified and necessary in order that these business expenses might be properly reflected under Section 23 (a).

Hence the Commissioner, by this contemporary modification of these pre-existing regulations, gave recognition to the difference between such *casual* sales of securities and sales of securities *in the course of a trade or business.*

Thus it cannot accurately be said, as argued by the lower court, that G. C. M. 15430 (C. B. XIV-2, page 59, promulgated on September 23, 1935) was "the statement of the long-continued construction of law and regulations by the administrative officers charged with the enforcement thereof."

Moreover it is wholly without significance with respect to the deductibility of business expenses that "dealers in securities" are treated differently from "traders" in stocks and bonds with respect to the matter of *inventorying* securities.

In this regard, the Commissioner of Internal Revenue unsuccessfully sought to make this distinction between "dealers in securities" and "traders" in the case of *Dart* v. *Commissioner*, 74 Fed. (2d) 845, 847. In rejecting this identical untenable position of the Commissioner, the United States Circuit Court of Appeals for the Fourth Circuit in that case said:

> "It is also contended that, while dealers are allowed to deduct expenditures of this character in the year in which they are made, a different rule should apply to those who, while engaged in the business of trading in stock, are not dealers. We do not think there is any merit in this contention. Subsection (a) (1) of Section 214 of the Revenue Act of 1926 and (a) of Section 23 of the Revenue Act of 1928 make no distinction as between dealers and others who are engaged in carrying on a trade or business, nor do we see why any distinction should be made. As we said in Colony Coal & Coke Corp. v. Commissioner, 52 Fed. (2d) 923, the real test is the character of the transaction that occasions the payment."

In that case the Circuit Court allowed dividends paid on short sales to be deducted as ordinary and necessary business expenses, rather than to add such expenses to the cost of the stock. This decision was cited with approval by this Court in *Deputy* v. *DuPont*, 308 U. S. 488, 495, 60 S. Ct. 363, 367, when it clearly recognized that an active trader in securities was engaged in a "business," within the meaning of Section 23 (a). In that case this Court said:

> "Thus, it has been held that one who was an active trader in securities might take as deductions carrying charges on short sales since short selling was common in that business."

Support for the decision of the court below cannot be found in the argument that the words "amount realized" used and defined in Section 111 of the Revenue Act of 1934 furnish statutory authority for offsetting selling commissions against the actual selling price.

When Congress first defined the statutory phrase, "amount realized" in the 1924 Revenue Act, it is clear that it meant "amount received *for the property upon the sale*". Specifically, it meant the *consideration* or *selling price* for the property upon the sale, as distinguished from the selling price less the selling commission. The early construction of the original law by this court (*Walsh* v. *Brewster, etc., infra*, p. 17), in the light of the committee reports explaining these developments of the statute relating to the gain from the sale of property, makes it clear that the statutory "amount realized" was first inserted and later defined merely to give "explicit effect to the doctrine approved" by this court in those early decisions.

The provisions of law corresponding to the provisions of Section 111 (a) and (b) of Revenue Act of 1934 originated in Section 202 (a) and (c) of Revenue Act of 1924 and read as follows:

> "Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized."
>
> • • • •
>
> "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

The report of the Ways and Means Committee (68th Cong., 1st Session, H. Rept. 179) had the following to say about this new provision of law:

> "There is no provision of the existing law which corresponds to this section of the bill. The purpose in

embodying in the law this section is to show clearly the method of determining the amount of gain or loss from the sale or other disposition of property.

(1) Subdivision (a) of this section sets forth the general rule that the amount of the gain or loss from the sale or other disposition of property is the difference between the cost or other basis of the property sold and the *amount received for the property upon the sale.* This merely embodies in the law the present construction by the department and the courts of the existing law." (Emphasis ours) (Page 12)

See also report of Senate Finance Committee, 68th Cong., 1st Session, S. Rept. 398, page 13.

It is clear, both from the report and the language of Sec. 202 (c) of the 1921 Act, that the authors of the definition were referring to the price received whether in money or property, not that price reduced by expenses incurred in making the sale or other disposition. Clearly the changes were clarifying ones. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468-469; *Haggar Co.* v. *Helvering*, 308 U. S. 389, 400. See also Art. 116, Regs. 33, Jan. 2, 1918.

"Profits or income derived" or "gross income" in the statutory sense, include, among other things, "profits gained through sale or conversion of capital assets," and such profits of a taxpayer include "only the difference between his investment * * * and the *amount realized.*" *Walsh* v. *Brewster*, 255 U. S. 536, 538, *Goodrich* v. *Edwards*, 255 U. S. 527, 534 and *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509, 519. In this latter case the "*amount realized*" was also referred to as "the *price* realized." (255 U. S. 518) In all of these cases, when this court used the expression "amount realized" it clearly meant "selling price realized." For example in *Walsh* v. *Brewster*, at page 538 of 255 U. S., it said:

"* * * the gain to the taxpayer was only the difference between his investment of $231,300 and the amount realized by the sale, $276,150."

This latter figure ($276,150) was arrived at as follows from the opinion of the District Court in *Brewster* v. *Walsh*, 268 Fed. 207, 209:

> "From the stipulation it further appears that plaintiff sold the bonds in 1916 for $276,150, part of them having been sold at 107⅜ and part at 107½."

The stipulation, page 14 of the Record before this court, No. 742, October Term 1920, shows the face value of the bonds sold at 107⅜ to have been $100,000, yielding $107,375, and the face value of those sold at 107½ to have been $157,000, yielding $168,775.

$107,375	
168,775	
$276,150	amount realized

Brokers selling commissions do not appear to have been eliminated in arriving in this computation of the "amount realized" to which this court addressed itself. Nor do they appear to have been considered in any of these cases as affecting the "amount realized." These words, therefore, were obviously employed by this court in the same sense as "selling price."

The words "amount realized" were first introduced in the Revenue Law in Section 202 (b) (1), (2) and (3) of the Revenue Act of 1921, to give "explicit effect to the doctrine approved" in *Merchants' Loan & Trust Co.* v. *Smietanka*, *Goodrich* v. *Edwards* and *Walsh* v. *Brewster* (*supra*), in computing gain or loss from the sale of capital assets. See Ways and Means Committee Report, 67th Cong. 1st Sess., H. Rept. 350, page 9 and Senate Finance Committee Report, 67th Cong. 1st Sess., Sen. Rept. 275, page 10.

Brokers commissions on the sale of "property" in its broad sense used in the statute, are not invariably withheld by the broker, from the selling price or the amount realized. When such selling commissions are so withheld, they constitute a part of the transaction between the *seller* and the

broker and *not* part of the transaction between the *seller* and the *buyer*. Until such commissions are paid, the *broker* is a *creditor* of the seller and by permitting the offsetting of this debt of the seller to the broker, against the seller's money in the hands of his *creditor* (the broker) the seller clearly "realizes" this portion of his selling price of the "property" sold, although he did not actually receive, in cash, that portion of the selling price equal to the commission so withheld. Obviously, under these circumstances, the *entire selling price* is the "amount realized." *Helvering* v. *Horst*, 311 U. S. 112, 116, 61 S. Ct. 144, 147.

In any event, "the sum of any money received" (Sec. 111 (b)) should not depend upon whether part is withheld from the purchase price, or all is paid first to the seller, who may pay his commissions or other expenses himself in cash from the gross fund. There is no more justification for offsetting *selling commissions* in arriving at the "amount realized" than there would be for offsetting *taxes* and *interest*, both of which are deductible and both of which are, in practice, withheld from the selling price by the broker.

It was necessary to use some such words as "amount realized" as defined in the statute. The words "selling price" would not suffice, because, frequently only a small portion of the selling price is received during the taxable year. Frequently, also, only a portion of the selling price is represented by cash, while the remainder is represented by property received having some fair market value.

Congress has the power to condition, limit or to deny deductions from gross income. Such deductions, thus, are allowable only as a matter of legislative grace. *Helvering* v. *Winmill*, 305 U. S. 79, 84, *New Colonial Ice Co. Inc.* v. *Helvering*, 292 U. S. 435, 440, *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, 381, *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 304. To say, therefore, that selling commissions are an offset against selling price, in arriving at gross income, is to say that such selling expenses are beyond the power of Congress to disallow—that their allowance,

unlike all other allowances, is *not* a matter of legislative grace.

Obviously, the word "property" is used in Section 111 and 113 in a very broad sense and includes real estate, securities, stocks, bonds and commodities. There is no statutory warrant for not computing the gain or loss from the sale or disposition of all "property" consistently, whether it be real estate, securities or commodities.

The "construction by the department and the courts of the existing law" as at the time of the passage of the 1924 Act, insofar as it applies to the treatment of *selling commissions* on "property" sold in the course of one's trade or business, is indicated by the commissioner's ruling of September 1926, namely, I. T. 2305 published on page 108 of Cumulative Bulletin V-2. This ruling reads as follows:

> "In the case of sales of real estate by persons not regularly engaged in that business, commissions paid, while they *do not reduce or otherwise affect the amount of the selling price*, may be offset against the selling price in determining the amount of gain or loss realized from such sales, and in cases of installment sales in determining the percentage of profit in each installment payment which is to be included in gross income.
>
> "Dealers in real estate should deduct commissions paid for the sale of real estate as a business expense for the year in which paid or accrued, in accordance with the basis on which their books are kept." (Emphasis ours)

The words "dealers in real estate" have no significance either under the Statute or the Regulations. The allowance of commissions on real estate sales as a business expense was approved by the Board of Tax Appeals in *The Highlands Trust*, No. 1546, 32 B. T. A. 760, (June 12, 1935) expressly on the authority of I. T. 2305 quoted above. In that case the taxpayer was seeking to add commissions to the cost of real estate sold during the year. This the Board refused to do, saying at page 766:

"We gather from statements in the deficiency notice and the briefs of the parties that the respondent treated the commission retained by the Paramount Realty Corporation as a deductible business expense rather than as a reduction of either the selling price of the lots or the initial payment thereon. *This is in accordance with the long established practice of the Bureau.* See I. T. 2305, C. B. V-2, P. 108; art. 352, Regulations 74 and 77; art. 44-2, Regulations 86. Petitioners' claim, as we understand it, is that the net amount received after deducting the part retained by the Paramount Realty Corporation should be treated as the selling price. This would have the effect of throwing back into the earlier years some of the profit ultimately realized on the deferred payment sales. We know of no authority for this method of computing income. The gross amount which purchasers contracted to pay was the selling price and must be accounted for as such, regardless of bookkeeping or accounting methods. *Commissions on sales are business expenses to be deducted in the years of accrual or payment, according to whether the taxpayer is on the accrual or cash basis, and are to be deducted in arriving at net income.* This is the normal method of determining income and petitioners have not shown any reason for a departure therefrom. Some argument is made as to the lack of value of the sales contracts. We do not see what this has to do with the question presented; moreover, there is no evidence at all as to the value of the contracts." (Emphasis ours)

See also *Clarence Whitman* v. *Commissioner*, 16 B. T. A. 197, 199, affirmed (C. C. A. 2) 49 Fed. (2d) 1087, *Alexander Sprunt & Son Inc.* v. *Comm.*, 64 Fed. (2d) 424, 428 and *Kornhauser* v. *U. S.*, 276 U. S. 145.

The principle is equally applicable under the Statute (Sec. 111 and 113) to one whose trade or business involves the purchase and sale of securities, commodities or real estate for a profit. The selling commissions constitute "compensation for personal services actually rendered," "in carrying on any trade or business," and are clearly deductible.

It is obvious, therefore, that insofar as selling commissions on "property" sold in the course of ones trade or business is concerned, there is nothing either in the law or the regulations which evinces an intent, clear or otherwise, "to withdraw that special type of commissions from the general classification of Article 121" as this court found to exist with respect to "security purchase commissions" in the *Winmill* case. (305 U. S. 83, 84).

It was principally on the narrow ground that *purchase* commissions were by the law (Section 113(b)(1)) and by the Regulations (Art. 282) made a part of the cost of securities, that this court differentiated "security *purchase* commissions" from "commissions" in general in the *Winmill* case.

In the *Winmill* case, this difference between buying and selling commissions was undoubtedly the circumstance which led the Government to petition for certiorari only as to the *buying* commissions and not as to the *selling* commissions, although both were equally available for certiorari *if there is no difference between the two.* As a matter of fact the purchase commission's issue involved a claimed deduction in the amount of only $7,493.51 in the *Winmill* case, whereas the selling commissions issue involved $9,574.00. Both buying and selling commissions had been allowed specifically by the United States Circuit Court of Appeals for the Second Circuit, in that case, therefore, if there was no difference between them, both were available for review on certiorari. (See Transcript of Record, pages 9, 10, *Helvering* v. *Winmill,* No. 860, October Term, 1937, U. S. Supreme Court.)

The petition for certiorari in the *Winmill* case raised only the issue with respect to "brokerage purchase commissions in the purchase of securities, the sum of $7,493.00." The briefs of both parties and the decision of the Court only dealt with purchase commissions. The Circuit Court of Appeals in its decision (93 Fed. (2d) 494) allowed both buying and selling commissions. "The Government by failing to seek review of the ruling (on selling commissions)

has acquiesced in it." *Helvering* v. *Union Pacific Railroad Co.*, 293 U. S. 282, 285. This acquiescence is all the more significant because of the fact that the Government was deliberately distinguishing between buying and selling commissions by carefully selecting the purchase commissions issue for review and refraining from seeking review of the selling commissions issue, although both were involved in that single case and although both were available, if there was no difference between them. See page 7 of Brief of petitioner, no. 11, October Term 1938, wherein it is carefully stated:

> "The petition for certiorari sought a review of the decision only so far as it related to the commissions paid on the purchase of shares of stock, in the amount of $7,896.50 ($7,493.59 plus $403)."

The final mandate of the Circuit Court of Appeals in the *Winmill* case, after the partial reversal by this court, required the Board to deduct the selling commissions. The case was closed before the Board on this basis.

In *Commissioner* v. *Covington*, 120 Fed. (2d) 768, 771, the United States Circuit Court of Appeals for the Fifth Circuit recognized the modified language employed in Article 282 of Regulations 77 regarding selling commissions as deductible expenses where they are ordinary and necessary business expenses stating: "But it is also true that it has been uniformly held that this exception applies only to dealers in securities and that this provision was made and applied where the details of accounting in the dealers' business made it impractical for him to match his selling commissions against each individual sale," citing G. C. M. 15430, Cum. Bull. xiv-2, page 59.

G. C. M. 15430 is merely an opinion of the lawyer for the Commissioner of Internal Revenue. It does not have the force and effect that a Treasury Decision promulgated by the Commissioner with the approval of the Secretary of Treasury would have, and it cannot have the effect of modifying the meaning of Article 282 of Regulations 77.

The Commissioner of Internal Revenue was in September 1935 (when G. C. M. 15430 was published) actively engaged in the litigation affecting the construction of the law and regulations with respect to purchase and selling commissions: The *Winmill* case, in which these questions were actively being raised, was then set for hearing before the Board of Tax Appeals. It hardly seems appropriate, therefore, to give this opinion any greater weight than the brief of any other party to litigation of this sort.

Relative administrative expediency in the computation of business expenses does not warrant the discriminatory disallowance to one and the allowance to another of what in substance is the same thing, yet this is exactly what the Commissioner's lawyer in G. C. M. 15430 says has been the practice, and he does not even say that there is the slightest difficulty in determining the amount of the selling commissions of the "traders". The pretended difficulty lies only in the wholly unnecessary matching of selling commissions against individual sales in the case of the "dealer". Inferentially he argues, therefore, even though they may represent "compensation for personal services actually rendered" in the course of "carrying on any trade or business," and even though the statute mandatorily provides that such expenses shall be allowed as deductions, the Commissioner's basis of disallowance of such ordinary and necessary expenses to the *trader* is the alleged difficulty experienced in matching such commissions with each individual sale in the case of a so-called *"dealer."*

The only possible excuse for not allowing the deduction of brokers' commissions in connection with buying and selling securities or commodities, would be first that certain commissions might be "properly chargeable to capital account" under the terms of the statute.

The opinion of the Court in *Commissioner* v. *Covington* (*supra*), contains an unfortunate material misstatement of fact in this regard. For example the following statement appears in that opinion.

"The regulations of the Treasury Department have consistently provided, that deductions for commissions paid in the purchase and sale of securities by one who is not a dealer, are not deductible as business expenses, that commissions paid on purchases shall constitute a part of the cost of the securities, and commissions paid on sales shall be deducted from the selling price." 120 Fed. (2d) 768, 770.

As a matter of actual fact the *regulations* of the Treasury Department never in any case have provided that deductions for commissions paid in the sale of securities by *one who is not a dealer, are not deductible as business expenses.* This holding, however, appeared only in G. C. M. 15430 (*supra*), not in the regulations. This ruling is neither a Treasury Decision, nor a Regulation of the Treasury Department. It does not have the approval of the Secretary of the Treasury and when published by the Commissioner carried with it the warning that such informal rulings so published "have none of the force and effect of Treasury Decisions and do not commit the Department to any interpretation of law."

This court has consistently held that such "departmental rulings not promulgated by the Secretary" (of the Treasury) "are of little aid in interpreting a tax statute." *Biddle* v. *Commissioner*, 302 U. S. 574, 582, *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467, 468, where the Court called attention to the above quoted cautionary notice invariably published on the covers of the bulletins containing administrative rulings of the Bureau. See also *Higgins* v. *Commissioner, supra,* in which such rulings were referred to as "rulings of less dignity" than those approved by the Secretary of the Treasury. (312 U. S. 212, 215)

It matters not how much the discriminatory administrative practice may have been followed, such practice cannot have the effect rarely even accorded Treasury decisions of *changing the law* through the process of the tacit approval by Congress following subsequent reenactments of the law

without substantial change. *Biddle* v. *Commissioner, supra, Helvering* v. *New York Trust Co.* (*supra*).

The language of the statute permitting the deductibility of "compensation for personal services actually rendered," when such compensation is not properly chargeable to capital account, is entirely free from ambiguity. In the face of this clear language there is no excuse whatsoever for indulging in a construction of that language that will result in allowing "dealers" to deduct selling commissions on the sale of securities and to prohibit a similar benefit to persons who are merely known as "traders."

What is the ambiguity in this language which warrants the resort to the principles of constructions? And by what specious reasoning can such a discriminatory construction result from the reading of the plain terms of the act?

> "It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that, result from following the statute as written, must be relieved by legislation. * * * Construction may not be substituted for legislation. *United States* v. *Wiltberger*, 5 Wheat. 76, 95-96, 5 L. Ed. 37; *United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. Ed. 304; *Lake County* v. *Rollins*, 130 U. S. 662, 670, 9 S. Ct. 651, 32 L. Ed. 1060; *Caminetti* v. *United States*, 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168; *Ex Parte Public National Bank*, 278 U. S. 101, 49 S. Ct. 43, 73 L. Ed. 202; *United States* v. *Colorado & N. W. R. Co.* (C. C. A.), 157 F. 321, 327, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893."
>
> *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 277.

As stated by the Supreme Court in the case of *DeGaney* v. *Lederer*, 250 U. S. 376, 381:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them."

The words "compensation for personal services" as used in Section 23 (a) of the Revenue Act of 1934 are presumed

to be used in their ordinary and usual sense and with the meaning commonly attributable to them. In that sense and with that commonly attributable meaning, these words include compensation in the form of broker's selling commissions and when such compensation is paid in connection with the sale of stocks in the course of the ordinary and necessary operations of a taxpayer's trade or business, the statute mandatorily requires that said compensation for services actually rendered "shall" be allowed as a deduction in computing income.

Therefore the above language of the statute must be given effect according to its plain and unambiguous language. There is no occasion for construction of the phrase "compensation for personal services actually rendered." Such compensation is deductible unless it is "properly chargeable to capital account," within the clear meaning of that phrase as explained in the report of the Committee on Ways and Means, first introducing that language into the law.

In view of the foregoing it is clear that the selling commissions in the instant case are ordinary and necessary expenses of carrying on "any trade or business" because they constitute "compensation for personal services actually rendered" in connection therewith. The selling commissions are therefore deductible from this taxpayer's gross income for the taxable years 1934 and 1935.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed. Respectfully submitted.

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January 27, 1942.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 581.

No. 582.

ADOLPH B. SPRECKELS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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INDEX.

	Page
I. Sales Commissions as Deductible Expenses	2
II. Trader in Securities and Commodities Engaged in Trade or Business Within the Meaning of Section 23 (a)	5

CITATIONS.

Cases:

City Bank Farmers Trust Company, 313 U. S. 121	6
Dart v. Commissioner, 74 Fed. (2d) 845	9
Deputy v. Du Pont, 308 U. S. 488	9
Farley, Ex Parte, 40 Fed. 66	11
General Utilities & Operating Co. v. Helvering, 296 U. S. 200	8
Helvering v. Tex-Penn Oil Co., 300 U. S. 481	8
Helvering v. Union Pacific, 293 U. S. 282	4
Helvering v. Wood, 309 U. S. 344	8
Higgins v. Commissioner, 312 U. S. 212	6, 8, 9, 10
Hormel v. Helvering, 312 U. S. 552	7
Neuberger v. Commissioner, 104 Fed. (2d) 649 (referred to as the Neuberger case)	3
Pflueger v. Sherman, 393 U. S. 55	9
Smith v. Gilliam, 282 Fed. 628	12
United States v. City and County of San Francisco, 310 U. S. 16	12
United States v. Pyne, 313 U. S. 127	6, 8
United States v. Wilson, 58 Fed. 768	11
Van Wart v. Commissioner, 295 U. S. 112	12
Winmill v. Commissioner, 93 Fed. (2d) 494	2, 10
Winmill v. Commissioner, 35 B. T. A. 804	2

Miscellaneous:

Congressional Record	
Volume 56—Appendix p. 678	
65th Congress, 2nd Session	10-11
Congressional Committee Reports	
Conference Report 1203, accompanying H. R. 5417, 77th Congress, 1st Session, Amendment No. 41, p. 12	12
G. C. M. 15430, XIV-2 C. B. 59	2, 3
Regulations 86, Art. 22 (c)-5	3
Revenue Act of 1934	
Sec. 23 (a)	2
Sec. 23 (c)	4

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REPLY BRIEF FOR THE PETITIONER.

The respondent in his Brief and upon oral argument seeks to secure an affirmance of the action of the Circuit Court of Appeals in reversing the decision of the Board of Tax Appeals holding that petitioner was entitled to deduct as an ordinary and necessary business expense, commissions paid brokers on sales of stocks, bonds and other commodities on two grounds, one, that such deduction is avail-

able only to "dealers" by reason of uniform Treasury practice of many years' duration, and two, that petitioner's activities although found by the Board to constitute engaging in business, did not constitute a "trade" or "business" within the meaning of Section 23 (a) of the Revenue Act.

I. Sales Commissions as Deductible Expenses.

As pointed out in the Brief for Petitioner, the statute and regulations are clear that selling commissions are deductible as an ordinary and necessary expense of a business of buying and selling stocks, bonds and commodities for profit and but little can be added to what is there said. Respondent's claim of a long continued Treasury practice limiting such expense to dealers is based entirely on G. C. M. 15430, XIV-2 C. B. 59. This ruling was issued shortly after the amendment to the Regulations; consequent upon the adoption of the 1932 Act, and at a time when the right of a trader, as distinguished from a dealer, to the deduction was being litigated in the *Winmill* case (35 B. T. A. 804 and 93 Fed. (2d) 494). The *Winmill* case before the Board and the Circuit Court of Appeals involved both purchasing and selling commissions, the Court holding both deductible by a trader as a business expense. The Commissioner asked for certiorari only as to purchasing commissions and the decision of this Court is limited to a consideration of such commissions. If long-continued Treasury practice now warrants a denial of the right to deduct selling commissions, it is remarkable that the point was not urged to the Board or the Circuit Court of Appeals and even more remarkable that certiorari was not sought as to selling commissions also. Perhaps the Treasury practice was not sufficiently ancient and uniform at that time. In any event the alleged practice was not uniform in the sense that it applied to all "property."

The present Treasury interpretation received the approval of no court prior to the decision in the present proceeding. Since the doctrine announced in G. C. M. 15430

was, therefore at the time of its issuance, already under challenge, later sustained by the Circuit Court of Appeals for the Second Circuit in the *Winmill* and *Neuberger* cases, it is difficult to see how it can be relied upon as an authoritative interpretation limiting the express provision of the regulations making such commissions generally deductible as a business expense.

The regulations themselves are a negation of the existence of a Treasury practice such as is claimed respondent, since, with the reenactment of the 1932 Act, the regulations were changed, as noted in petitioner's brief and during oral argument, to exclude expressly from the former provision concerning the nondeductibility of sales commissions, such commissions as might be an ordinary and necessary expense of business.

G. C. M. 15430 is but a legal opinion of the Bureau's attorney, no more persuasive or controlling than the argument of counsel for respondent before this Court. A memorandum is incompetent as proof of Treasury practice. It is clearly hearsay and self serving. Had respondent intended to use long-continued Treasury practice as an authority to override the provisions of the law and regulations, he should have offered proof of such practice before the Board and asked a finding thereon.

In addition to relying upon G. C. M. 15430 as evidence of long-continued Treasury practice, respondent also relies upon it to establish that it is difficult, if not impossible, for a dealer in securities to match selling commissions with specific sales. This argument again assumes a fact not in evidence.

The regulations in Art. 22 (c)-5 define a dealer as a merchant of securities selling *directly to customers* and authorize such dealers to inventory their securities to determine gain or loss, a right denied to "taxpayers who buy and sell * * * securities for * * * speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business." Since a dealer must sell *directly to customers* to fall within the definition in the regulations, it

is difficult to see how he would have any selling commissions to pay. If he sells *through brokers*, he ceases to be a dealer within the definition. This again illustrates the impossibility of accepting a general counsel's memorandum as a substitute for testimony adduced at the hearing.

If, as contended on argument, the change in the regulations under the 1932 Act was merely a recognition of existing Treasury practice according dealers in securities the right to deduct selling commissions as a business expense, why was not an apt expression used to indicate that the exemption was limited to dealers rather than the phrase "when such commissions are not an ordinary and necessary business expense." Had the explicit limiting language been used, there would have been no occasion for a five page legal opinion to point out that the language actually used meant something other than what it says.

The use of a "net" selling price for computing gain or loss is not an established Treasury practice. For example, stamp taxes paid on the transfer of securities or commodities sold are deductible under section 23 (e) of the Revenue Act. This was done in the present case. R. 13-14, No. 581. If taxes necessarily paid in connection with a sale are not to be deducted in determining the amount received on sale, why should selling commissions be deducted when they are clearly an expense of doing business.

Nor does the holding in the *Union Pacific* case (293 U. S. 282) in anyway affect the determination of the present case. While it is true that the Court was there considering selling commissions and held that such commissions were "properly chargeable to capital account," the facts were that the *Union Pacific* was not seeking to deduct the commissions as the expense of a business of buying and selling bonds for profit, but to amortize such commissions over the life of the bonds (the company's own issue) as a cost of securing capital in the same category as bond discount. Obviously, the determination that such selling commissions are chargeable to capital account, can have no controlling value in the de-

termination of the right of a trader to deduct as a business expense, commissions paid on sales of bonds issued by others. In the case of the issuer, such commissions are a cost of securing capital and proper accounting practice requires their charge to capital account and their amortization over the life of the bond. In the case of a trader there is no "capital account" to which his *selling* commissions can be charged since the sale has closed the account.

Again it must be pointed out that the petitioner here was a trader in both securities and *commodities*, a situation ignored by respondent and upon which we have no evidence, even hearsay, of Treasury practice and not covered by any authority or rulings. Since the selling commissions related to sales of both securities and commodities and since there were no findings as to the amounts of each, nor evidence in the record brought to the Circuit Court of Appeals as to such segregation, that court should have affirmed the Board's decision if selling commissions upon commodities alone are deductible as a business expense, since the burden was upon the Commissioner before that court to show error in the record.

II. Trader in Securities and Commodities Engaged in Trade or Business Within the Meaning of Section 23 (a).

The first reaction to the respondent's second point is one of amazement that the argument would be advanced that a taxpayer commonly referred to as a *trader* is not engaged in a *trade* or business. However, in the present case, it is even more astounding that the argument is advanced for the first time in the proceeding before this court and upon the record brought up.

The Board found:

> "During the taxable years he (petitioner) maintained an office, with employees keeping complete sets of books, which were kept and the income tax returns were made upon the basis of cash receipts and disbursements. *Petitioner was engaged in the business of purchasing*

and selling stocks, bonds and commodities for profit. He paid to brokers selling commissions in connection with such sales as follows: In 1934, $23,692; in 1935, $2,246.25." No. 581, R. 24 (Emphasis supplied.)

The Board's opinion reads in part:

> "Are selling commissions paid by a trader in securities deductible as a business expense? * * * We hold therefore that the respondent upon this point is in error, and that the selling commissions are allowable deductions." No. 581, R. 26.

Respondent concedes that no point was made before the Board or the Circuit Court of Appeals that the activities of a trader, or of petitioner as trader did not constitute a trade or business. As clearly appears from the Board's opinion the only question presented was whether selling commissions are an expense of doing business. The Board made no finding of facts concerning petitioner's activities, but found that he was engaged in a business. Respondent cannot urge, as was done in *United States* v. *Pyne*, 313 U. S. 127, that the record showed that the Board in making its findings was unmindful of the definition of business approved by this court in the *Higgins* v. *Commissioner*, 312 U. S. 212, involving an investor's expenses, and the *City Bank Farmers Trust Company* v. *Helvering*, 313 U. S. 121, involving executor's expenses, since the Board had decided both of those cases prior to its decision in the *Spreckels* case and the action of this Court was to affirm the Board's definition.

Respondent must also concede that the question was waived before the Board since in his opening brief to that body, under the heading: "Respondent's Request For Findings of Fact" he says:

> "Upon the evidence, the respondent respectfully requests that the Board make the following findings of fact:

* * * * * * *

"3. During the calendar years 1934 and 1935, petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit, and during the calendar year 1934 paid selling commissions in connection with such sales amounting to $23,909.29, and for the year 1935 selling commissions amounting to $2,363.75. The selling commissions so paid were not taken as a deduction in computing petitioner's income tax for the years 1934 and 1935."

Respondent can scarcely expect this Court, at this late date, to permit him to argue that the Board should not have made a finding of fact he requested the Board to make.

Again, when the record on review was prepared, no suggestion was made that the point would be urged that petitioner's acivities did not amount to engaging in trade or business, (Assignments of Error R. 32-34, No. 582) nor was any attempt made to bring up the evidence before the Board: (Designation of Portions of Record, etc. R. 40-41, No. 582)

Had the point now urged been made, the evidence as well as the pleadings, findings and decision would have been brought up, including the respondent's request for the finding made, and the Circuit Court of Appeals could have considered whether the respondent was not precluded from making the point. It is submitted that in the record the question is not open for argument before this Court.

The present case is not one where it is sought to uphold the action of the Board on a theory not advanced before it, but rather to uphold the action of an appellate court *reversing* the Board's decision on a theory advanced neither to the Board nor to the appellate court. This is a step beyond the decision of this court in *Hormel* v. *Helvering*, 312 U. S. 552, where at least the new theory was argued before and relied upon by the Circuit Court of Appeals. If the exception be extended to the present situation, every record on appeal in the future, regardless of the specifications of error, must contain all the evidence taken and the arguments made before the trial court or Board. The rule to be

applied here is that announced in *Helvering* v. *Wood*, 309 U. S. 344, 348-349, where this court held that the Government having before the Circuit Court of Appeals, expressly waived any reliance upon a certain section of the revenue act, could not present before this Court, as a wholly new issue, the applicability of that section. See also: *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498, and *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 206-207. The remarks of the Court in the *General Utilities* case show the futility of the respondent's suggestion that, as in the *Pyne* case, the present case may be remanded for further proceedings in order that petitioner may adduce additional evidence as to his activities. (Respondent's Brief page 12) *In effect the respondent is asking a remand by this Court in order that he may bring up the evidence upon which the Board made a finding as requested by him and permit him then to argue to this Court that such request should not have been granted.*

The *Pyne* case is not in point as to the proposition that the Board's finding that petitioner was engaged in business is not conclusive here, since in the *Pyne* case the Court of Claims made findings as to evidentiary matters and failed to make the general finding that taxpayer was carrying on a business. This Court, therefore, was able, on the record in the *Pyne* case, to determine that the executors were not "carrying on any trade or business."

This Court states in the *Higgins* case, 312 U. S. 212, 217:

> "To determine whether the activities of a taxpayer are 'carrying on a business,' requires an examination of the facts in each case."

Obviously it is the duty of the Board to make this examination and to make its conclusion therefrom, having done so, whether the conclusion be regarded as an ultimate finding of fact, or a mixed finding of law and fact, it is conclusive on appellate review, even when the evidence is preserved in the record, which was not done here. The failure of the

Court of Claims to make this ultimate finding clearly distinguishes the *Pyne* case.

Compare the long-established practice of this Court to refuse to consider on certificate from a Circuit Court of Appeals mixed questions of law and fact. *Pflueger* v. *Sherman*, 293 U. S. 55, 57-58 and authorities cited.

Even though all rules relating to the timeliness of respondent's second point were waived, he is still confronted with the proposition that he must argue that under no set of facts or circumstances can the activities of one engaged in buying and selling stocks, bonds *or* commodities for profit amount to a trade or business, for only under such circumstances can the question become one of law. There is absolutely nothing in the record justifying respondent's suggestion (page 12 of his brief) that petitioner was "managing his investments" or, if he were, that his buying and selling activities had anything to do with that management. Furthermore, since his business was *buying and selling* for profit, the possibility that he was buying for investment is negatived. Accordingly the decision in *Higgins* v. *Commissioner, supra*, with reference to investment expenses has no application. It should be noted however that, in the *Higgins* case, the Board held that the taxpayer's real estate activities amounted to a trade or business and that the expenses sought to be deducted should be prorated in order that the taxpayer might have the benefit of the portion allocable to the real estate business.

That a trader in securities is engaged in a trade or business, is directly held by the Circuit Court of Appeals for the Fourth Circuit in *Dart* v. *Commissioner*, 74 Fed. (2d) 845, 847, cited with approval in *Deputy* v. *Du Pont*, 308 U. S. 488, 495. Inasmuch as "traders" invariably hold themselves out to the world, for the sale of their property, by means of orders to their brokers, such "traders" also satisfy the requirements as to such "holding out" in the concurring opinion in that case.

The Commissioner does not seem to have questioned the Court's conclusion in that regard. The Circuit Court

of Appeals for the Second Circuit in *Winmill* v. *Commissioner*, 93 Fed. (2d) 494, 496, was considering the case of a trader, held that his activities would have justified a finding that he carried on his operations as a trade or business and saw no reason for discrimination between dealers and traders. The respondent himself in Article 22 (c)-5 of Regulations 86, defining a "dealer in securities" assumes that a taxpayer's activities in the buying and selling of securities for speculation may constitute "the carrying on of a trade or business."

The statutory provision authorizing the deduction of business expenses in no way limits the character or extent of the trades or businesses entitled to such deductions. The language of Section 23 (a) of the Revenue Act of 1934, authorizes the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *." (Emphasis supplied) In *Higgins* v. *Commissioner*, *supra*, this Court in describing the evolution of the phrase "carrying on any trade or business" says:

> "Since the first income tax act, the provisions authorizing business deductions have varied only slightly. The Revenue Act of 1913 allowed as a deduction 'the necessary expenses actually paid in carrying on any business.' *By 1918 the present form was fixed and has so continued.* No regulation has ever been promulgated which interprets the meaning of 'carrying on a business,' nor any rulings approved by the Secretary of the Treasury, i.e., Treasury Decisions. Certain rulings of less dignity, favorable to petitioner, appeared in individual cases but they are not determinative." (Emphasis ours)

Congressman Claude Kitchin, Chairman of the House Committee on Ways and Means, submitted the report to accompany the bill H. R. 12863, which became the Revenue Act of 1918. To explain to the House what was meant by the phrase "trade or business" as used for the first time in that Bill (Congressional Record, Volume 56, Appendix

Page 678, 65th Congress, 2nd Session), he said to the House:

> "Under the present act a loss to the taxpayer can only be deducted if it is connected with the transactions of the business, while a casual loss on the outside cannot be deducted. To illustrate, *suppose I am a player of the stock market, and that is my business.* Suppose I lose $50,000. I can deduct that from my total year's earnings. Say my total income is $100,000, and that I lost $50,000; but if I am a merchant, a farmer, or a lawyer, and happen to see something in the paper which makes me think I can make a big sum of money, and then I go out and buy a future contract, and make a loss of $10,000, I cannot deduct that from my income under the existing law or under the act of 1913. Suppose in my business as merchant, lawyer, or farmer I made $10,000. I would have to pay an income tax on that whole $10,000, although I had lost $10,000 in three days on a little side stock-exchange gamble that I had made. Now, this bill permits all taxpayers to deduct their losses that are made in their business or outside of their business during the year. If I make $10,000 in the practice of the law and lose $10,000 on the stock market I can deduct it because in the case I have supposed I would have no income left." (Emphasis ours)

Since the only example cited by the Chairman of the Committee on Ways and Means so aptly covers the situation of the present petitioner, and since no case can be found holding that the activities of a trader in securities or commodities is not a trade or business within the meaning of Section 23 (a), it seems unnecessary to cite further authority.

The Court is entitled to consider the explanation of Mr. Kitchin, under the doctrine that statements of those who had charge of the law made to the legislative body passing it as to its meaning and purpose are always competent. *Ex. Parte Farley*, 40 Fed. 66, 69.

United States v. *Wilson*, 58 Fed. 768, 771 (statements of Senator in charge of bill).

This rule as to competency includes "explanations * * * made by those engaged in helping to prepare and urge the enactment of the legislation." *Smith* v. *Gilliam*, 282 Fed. 628, 636.

In the recent case of *United States* v. *City and County of San Francisco*, 310 U. S. 16, 20, this Court gave extensive consideration to Congressional debates during the passage of the Hetch Hetchy Bill, stating they were competent as indicating, "a common understanding both on the part of the sponsors of the bill and its opponents."

This Court did not in the *Higgins* case announce a new definition of doing business, but merely affirmed the application to an invester of the rule announced by the Court in *Van Wart* v. *Commissioner*, 295 U. S. 112. It was held in that case that where under the facts, a ward under guardianship was not engaged in business, the guardianship as such was not a business or entitled to deduct certain attorneys fees. Certainly there is nothing in the *Van Wart* case, or any case based thereon, which would justify on the record before this Court, a reversal of the Board's conclusion that petitioner was engaged in a trade or business.

That neither Congress nor the Treasury is prepared to follow the *Higgins* case is indicated by the Conference Report 1203, accompanying H. R. 5417, 77 Congress, 1st Session, Amendment No. 41, page 12, reading as follows:

> "Amendment No. 41: This amendment amends section 23 (a) (1) of the Internal Revenue Code by inserting after the words 'taxable year' the words 'in conserving and conducting the business affairs of the taxpayer.' The conferees have deferred action on the merits of this amendment with the understanding that it will be considered in a later bill dealing with administrative matters. They were advised by the Treasury Department that wherever possible final decision by the Bureau of Internal Revenue on issues arising under the *Higgins* v. *Smith* (sic.) decision would be deferred pending such later legislation. The Senate recedes." (The case intended is *Higgins* v. *Commissioner*, 312 U. S. 212.)

We understand that similar relief is proposed in the 1942 amendments to the Revenue Act about to be proposed. Clearly under such circumstances there is no occasion for further restrictions on the meaning of trade or business as used in section 23 (a)-1.

The decision of the Circuit Court of Appeals is incorrect and should be reversed.

Respectfully submitted,

WALTER SLACK,
THOMAS M. WILKINS,
Attorneys for Petitioner.

Nos. 581 and 582

In the Supreme Court of the United States

OCTOBER TERM, 1941

ADOLPH B. SPRECKELS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

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Although we believe the decision below to be correct, we do not oppose the petition because of the conflict with decisions in the Second Circuit.[1]

[1] With respect to the year 1934 (No. 581) the Board of Tax Appeals held that the taxpayer was barred by limitations because an amendment to a claim for refund was filed more than three years after the last payment of the tax. The court below did not pass upon this question on the ground that it was unnecessary in view of its decision that the commissions on sales were not expenses. If this Court grants the petitions for certiorari and reverses the decision of the court below on the merits, we will request that No. 581 involving the year 1934 be remanded to the Circuit Court of Appeals for a decision on the question of limitations.

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The question presented is whether a taxpayer engaged in the business [2] of buying and selling securities and commodities is entitled to deduct commissions on sales as ordinary and necessary business expenses within the meaning of Section 23 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, when he buys and sells for his own account. The court below held that commissions on sales in the circumstances of this case were not expenses within the meaning of Section 23 (a), but were in the nature of a capital charge to be applied against and reduce the amount of the selling price received by the taxpayer. Thus, under the court's decision, the taxpayer is not deprived of a "tax advantage" with respect to such commissions; they are simply reflected in his capital gains or losses by decreasing the amount of his taxable gain or increasing the amount of his loss, subject only to the statutory limitations dealing with such gains or losses. Cf. *Helvering* v. *Winmill*, 305 U. S. 79 (purchase commissions).

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[2] Neither the Board of Tax Appeals nor the court below considered the question whether the taxpayer was engaged in "business" within the meaning of Section 23 (a) of the Revenue Act of 1934, when he traded for his own account. In view of the recent decisions of this Court in *Higgins* v. *Commissioner*, 312 U. S. 212; *United States* v. *Pyne*, 313 U. S. 127; and *City Bank Co.* v. *Helvering*, 313 U. S. 121, we may undertake to support the result below on the further ground that the petitioner was not engaged in "business" within the meaning of the statute.

In refusing to allow the selling commissions to be deducted as expenses the decision below is in conflict with the decisions of the United States Circuit Court of Appeals for the Second Circuit in *Winmill* v. *Commissioner*, 93 F. (2d) 494, and *Neuberger* v. *Commissioner*, 104 F. (2d) 649, reversed by this Court on other grounds, 311 U. S. 83. The decision of the court below has been followed by the Circuit Court of Appeals for the Fifth Circuit in *Comissioner* v. *Covington*, 120 F. (2d) 768, in which a petition for rehearing was denied on July 11, 1941.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

SEPTEMBER 1941.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	4
Argument:	
I. The sales commissions were not deductible as expenses; they were merely a charge against the sales price	6
II. The deductions are in any event not allowable as expenses because the record does not show that petitioner was engaged in carrying on a "trade or business" within the meaning of Section 23 (a)	11
Conclusion	13
Appendix A	14
Appendix B	16

CITATIONS

Cases:	
City Bank v. *Helvering*, 313 U. S. 121	12
Commissioner v. *Covington*, 120 F. (2d) 768, pending on petition for certiorari, Nos. 693–694, this Term	11
Doyle v. *Mitchell Brothers Co.*, 247 U. S. 179	11
Helvering v. *Gowran*, 302 U. S. 238	12
Helvering v. *Union Pacific Co.*, 293 U. S. 282	5, 10
Helvering v. *Winmill*, 305 U. S. 79	4, 6, 10
Higgins v. *Commissioner*, 312 U. S. 212	12
Hormel v. *Helvering*, 312 U. S. 552	12
Hutton v. *Commissioner*, 39 F. (2d) 459	10
Neuberger v. *Commissioner*, 104 F. (2d) 649, reversed on other grounds, 311 U. S. 83	11
United States v. *Pyne*, 313 U. S. 127	12
Statutes:	
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 101	8
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 101	8
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 23 (U. S. C., Title 26, Sec. 23)	14
Sec. 117	8

446232—42——1

Miscellaneous:	Page
G. C. M. 15430, XIV-2 Cum. Bull. 59 (1935)	9, 16
Treasury Regulations 33 (Revised), Art. 8	7
Treasury Regulations 45, Art. 293	7
Treasury Regulations 62, Art. 293	7
Treasury Regulations 65, Art. 292	7
Treasury Regulations 69, Art. 292	7
Treasury Regulations 74, Art. 282	7
Treasury Regulations 77, Art. 282	9
Treasury Regulations 86:	
Art. 22 (c)-5	8
Art. 23 (a)-1	14
Art. 24-2	9, 15
Treasury Regulations 94, Art. 24-2	9
Treasury Regulations 101, Art. 24-2	9
Treasury Regulations 103, Sec. 19.24-2	9

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22)[1] is reported in 41 B. T. A. 1204. The opinion of the Circuit Court of Appeals (R. 52) is reported in 119 F. (2d) 667.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1941 (R. 66). A petition

[1] The record references will be to the record in No. 581 unless otherwise indicated.

for rehearing was denied on July 28, 1941 (R. 67). A petition for a writ of certiorari was filed on September 3, 1941, and granted on October 20, 1941 (R. 69). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a taxpayer engaged in buying and selling securities and commodities for his own account is entitled to deduct commissions on sales as ordinary and necessary expenses under Section 23 (a) of the Revenue Act of 1934, or whether such commissions must be treated as an offset against the selling price.

2. If such commissions were otherwise deductible from gross income, the further question arises whether in trading for his own account the taxpayer was engaged in "business" within the meaning of Section 23 (a).

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in Appendix A, *infra*, pp. 14–15.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 24–26), part of which were stipulated (R. 24), are substantially as follows:

The taxpayer lives in San Francisco, California. During the taxable years, 1934–1935, he main-

tained an office with employees, and kept a complete set of books on the cash receipts and disbursements basis. He was engaged in purchasing and selling stocks, bonds, and commodities for profit. He paid selling commissions to brokers in connection with such sales as follows: $23,692 in 1934 and $2,246.25 in 1935. In computing his net income on his income-tax returns for the taxable years 1934 and 1935 he did not deduct the selling commissions as ordinary and necessary expenses. His books showed such commissions as offsets against the selling price before net profit or loss was determined (R. 24).

The Commissioner determined deficiencies against the taxpayer with respect to issues no longer in dispute and those deficiencies were in turn partly offset by the taxpayer's claim for refund with respect to deductions on account of stamp taxes which are likewise no longer in dispute. However, after the Board proceedings had been commenced, petitioner attempted for the first time, on June 8, 1939, to amend his petition and seek an additional refund on the ground that he should have been allowed deductions on account of sales commissions (R. 27).

In No. 581, involving the year 1934, the Board determined that since the amendment to the petition was filed more than three years after payment of the 1934 taxes, the taxpayer was precluded from raising the issue by the statute of limita-

tions (R. 26–31, No. 581). In No. 582, however, involving the year 1935, the Board sustained the taxpayer, holding that the deduction should have been allowed.

Upon appeal, the court below found it unnecessary to pass upon the limitations question for the year 1934, since, in its view of the case, the sales commissions were not deductible, and therefore the taxpayer was not entitled to prevail with respect to either year. It accordingly affirmed the judgment in No. 581 (R. 66), and reversed the judgment in No. 582 (R. 45).

SUMMARY OF ARGUMENT

1. This case is the complement to *Helvering* v. *Winmill*, 305 U. S. 79, which held that purchase commissions could not be deducted as expenses under the identical provisions of Section 23 (a) of an earlier revenue act, but that they were to be treated as part of the cost of the securities. Here, petitioner seeks to deduct sales commissions. The regulations, however, have long provided that neither purchase nor sales commissions are deductible, that purchase commissions are to be added to the purchase price, and that sales commissions are to be charged against the selling price.

The Treasury practice has been uniform for many years, with the single exception of sales commissions in the case of "dealers." In view

of certain accounting difficulties that made it impracticable to match selling commissions against sales prices in the case of dealers, the Treasury had permitted the latter to deduct those commissions. Petitioner, however, is not a "dealer," nor does he claim to be such. The change in regulations under the 1932 Act was merely intended to embody the exception that had previously existed in practice with respect to dealers.

The regulations as to sales commissions are fully applicable to petitioner and should be sustained here just as the provisions relating to purchase commissions were sustained in the *Winmill* case. Moreover, the opinion in the *Winmill* case quoted with approval language in *Helvering* v. *Union Pacific Co.*, 293 U. S. 282, 286, which appeared to approve the regulations as applied to both purchase and sales commissions.

2. The decision below is correct upon the additional ground that petitioner's activities in buying and selling securities and commodities on his own account do not constitute "business" within the meaning of Section 23 (a), with the consequence that the amounts in question are in any event not deductible as business expenses.

3. Should the Court rule against the Government upon the merits herein, No. 581 relating to the year 1934 should be remanded for a decision on the statute of limitations issue.

ARGUMENT

I

THE SALES COMMISSIONS WERE NOT DEDUCTIBLE AS EXPENSES; THEY WERE MERELY A CHARGE AGAINST THE SALES PRICE

The issue here presented is the counterpart to the question decided in *Helvering* v. *Winmill*, 305 U. S. 79. In the *Winmill* case this Court held that *purchase* commissions were not deductible as business expenses under Section 23 (a) of the Revenue Act of 1932, but were to be treated as an additional element of cost of the securities purchased.[2] The instant case involves *sales* commissions, and we contend that they are similarly not deductible as business expenses under the identical provisions of Section 23 (a) of the Revenue Act of 1934, but are merely to be treated as a charge against the selling price, reducing *pro tanto* the amount of gain or increasing *pro tanto* the amount of loss upon sale.

The Treasury Regulations over a period of many years have consistently treated commissions paid in purchasing or selling securities as a part

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[2] That result did not mean that the payment of purchase commissions had no tax consequences: it simply meant that by adding the purchase commissions to cost, they would ultimately be reflected in computing the profit or loss upon subsequent resale by the taxpayer. Of course, that profit or loss might be subject to statutory restrictions relating to capital gains and losses, etc.

of the cost or selling price of the securities rather than ordinary expense deductions. Article 8, paragraph 108, of Treasury Regulations 33, Revised, construing the Revenue Act of 1916, c. 463, 39 Stat. 756, provided that:

> *Expense—Commissions paid.*—Commissions paid in purchasing and selling securities are a part of the cost or selling price of the securities and not otherwise deductible. They do not constitute expense deductions in a return of income.

Article 293 of Regulations 45, explaining the Revenue Act of 1918, read in part as follows:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities are an offset against the selling price. * * *

The same language appeared in Article 293 of Treasury Regulations 62, with respect to the Revenue Act of 1921; Article 292 of Treasury Regulations 65, with respect to the Revenue Act of 1924; Article 292 of Treasury Regulations 69, with respect to the Revenue Act of 1926; and Article 282 of Treasury Regulations 74, explaining the Revenue Act of 1928.

The regulations as to purchase commissions had been applied uniformly throughout the years, and were sustained in the *Winmill* case. In applying the regulations as to sales commissions the Treas-

ury had allowed one exception, namely, in the case of dealers in securities. A "dealer" in securities is more than a mere trader; he is "a merchant of securities, * * * with an established place of business, regularly engaged in the purchase of securities and their resale to customers," and, unlike a trader, a dealer is entitled to use inventories under the revenue acts.[3] Since dealers generally purchased securities in large blocks and sold them in smaller lots, and since dealers' sales commissions were often computed and paid on a volume of sales rather than on individual transactions, it was impracticable for a dealer to match his selling commissions against individual sales. In recognition of those accounting difficulties the Treasury permitted dealers to deduct selling commissions as expenses. But in allowing the deductions the Treasury did not concede that they were expenses; rather, it merely permitted them to be treated as expenses in view of the practical accounting difficulties that would be encountered if an attempt were made to charge them against the sales price.[4]

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[3] See e. g., Regulations 86, Article 22 (c)–5.

[4] This method of handling sales commissions ordinarily did not make any difference in a dealer's tax liability; for his gains or losses were not capital gains or losses, and it did not matter to a dealer whether his sales commissions were deducted as expenses or subtracted from the sales price. See, e. g., Section 101 (c) of the Revenue Acts of 1928 (45 Stat. 791) and 1932 (47 Stat. 169), and Section 117 (b) of the Revenue Act of 1934 (48 Stat. 680).

That practice with respect to dealers was finally incorporated into the regulations by the addition of the rather cryptic clause, italicized below, in Article 282 of Regulations 77, under the Revenue Act of 1932:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business expense,* are an offset against the selling price. * * * [Italics supplied.]

The same language appears in Article 24–2 of Treasury Regulations 86, under the Revenue Act of 1934; Article 24–2 of Treasury Regulations 94, under the Revenue Act of 1936; Article 24–2 of Treasury Regulations 101, under the Revenue Act of 1938, and Section 19.24–2 of Treasury Regulations 103, under the Internal Revenue Code.

The reason for the change and the meaning of the new provisions were thereafter fully explained in G. C. M. 15430, XIV–2 Cum. Bull. 59,[5] which is reproduced in full in Appendix B, *infra*, pp. 16–20.

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[5] We fully recognize that G. C. M. 15430 is merely an informal ruling, and, as such, does not have the same dignity as a regulation for the purpose of construing the statute. But the Court is justified in referring to it to ascertain what the Treasury practice *in fact* has been, just as it may seek enlightenment from any source as to actual administrative practice. And in this case, G. C. M. 15430 accurately describes the administrative practice, and supplies an explanation for an otherwise inexplicable change in the regulations.

Thus, these new provisions were not intended to effect any change in practice; they were intended merely to accord recognition to the exceptional situation that had existed all along with respect to dealers. The regulations, both before and after the change have been cited with approval by this Court in *Helvering* v. *Union Pacific R. Co.*, 293 U. S. 282, 286:

> * * * commissions [paid for marketing bonds] do not differ from brokerage commissions paid upon the purchase or sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax.

And this statement was quoted with apparent approval in the *Winmill* decision. 305 U. S. at 83.

We respectfully submit that these principles should be controlling, and that the *Winmill* case should be followed here.[6] Indeed, petitioner him-

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[6] The *Winmill* case itself originally involved sales as well as purchase commissions, both of which had been allowed as expense deductions by the Circuit Court of Appeals. The Government sought certiorari only as to the purchase commissions, since a direct conflict existed at that time only with respect to purchase commissions. (*Hutton* v. *Commissioner*, 39 F. (2d) 459 (C. C. A. 5th).) As a consequence of the limited character of the writ in the *Winmill* case, the Second Circuit thereafter continued to adhere to its former decision as to sales commissions, although it appeared to bow to this

self treated the sales commissions as a charge against selling price on his own books (cf. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 187), and there is no sound basis for any distinction between purchase and sales commissions. Except in the case of dealers—and petitioner does not contend that he is a dealer—the administrative practice has been just as long continued and consistent with respect to sales commissions as it has been with respect to purchase commissions. That practice which was sustained in the *Winmill* case should govern here.

II

THE DEDUCTIONS ARE IN ANY EVENT NOT ALLOWABLE AS EXPENSES BECAUSE THE RECORD DOES NOT SHOW THAT PETITIONER WAS ENGAGED IN CARRYING ON A "TRADE OR BUSINESS" WITHIN THE MEANING OF SECTION 23 (a)

Although the court below did not pass upon this question, its decision may nevertheless be supported upon the further ground (cf. *Helver-*

Court's decision as to purchase commissions. Cf. *Neuberger* v. *Commissioner*, 104 F. (2d) 649, reversed on other grounds, 311 U. S. 83. The court below, however, as well as the Fifth Circuit (*Commissioner* v. *Covington*, 120 F. (2d) 768, pending on petition for certiorari, Nos. 693–694, this Term) realistically ruled that no sound distinction could be drawn between purchase and sales commissions and that this Court's decision in the *Winmill* case should govern in the case of sales commissions.

ing v. *Gowran*, 302 U. S. 238, 245) that petitioner was not engaged in "business" within the meaning of Section 23 (a). See page 2 of Government's memorandum in response to the petition for certiorari herein. While it is true that the Board of Tax Appeals purported to find that the taxpayer "was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit" (R. 24), that finding was made under the mistaken understanding of the meaning of "business" as used in the revenue acts. In these circumstances that finding is not conclusive here. Cf. *United States* v. *Pyne*, 313 U. S. 127. If petitioner were merely engaged in buying and selling securities on his own account and managing his investments, such activities do not constitute "business" as a matter of law. *United States* v. *Pyne, supra; Higgins* v. *Commissioner*, 312 U. S. 212, 218; *City Bank Co.* v. *Helvering*, 313 U. S. 121. Of course, if petitioner wishes to adduce any additional evidence relevant to the issue of his "business" activity, the proper procedure would be to remand this case for further proceedings as was done in the *Pyne* case.[7] Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 560.

As we pointed out in our answer to the petition for certiorari, the court below did not pass upon the question of limitations, since the decision on

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[7] Upon remand of the *Pyne* case the Court of Claims in June 1941 dismissed the taxpayer's petition.

the merits made it unnecessary to consider the limitations issue. However, if this Court should reverse on the merits, we request that No. 581 (relating to the year 1934) be remanded for a decision on the question of limitations.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY 1942.

APPENDIX A

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * * (U. S. C., Title 26, Sec. 23).

Treasury Regulations 86, explaining the Revenue Act of 1934:

> ART. 23 (a)-1. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 23 (b)-1 to 23 (q)-1. Double deductions are not permitted. Amounts deducted under one provision of the Act cannot again be deducted under any other provision of the Act. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. (See article 22 (a)-5.) Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles

used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 23 (a)–2), advertising and other selling expenses, * * *.

ART. 24–2. *Capital expenditures.*—* * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. * * *

APPENDIX B

G. C. M. 15430, XIV-2 Cum. Bull. 59 (1935):

REVENUE ACT OF 1934

Buying commissions are a part of the cost of securities and are not deductible as ordinary and necessary business expenses. Selling commissions are an offset against the sale price and are not deductible as ordinary and necessary business expenses, except in the case of a dealer in securities.

An opinion is requested whether commissions paid in connection with sales of securities are deductible as ordinary and necessary business expenses under section 23 (a) of the Revenue Act of 1934, or whether they should be used as an offset against the selling price of the securities in computing gain or loss.

The question as to the deductibility of such commissions involves three classes of taxpayers—(1) a dealer in securities, (2) a trader in securities, and (3) a taxpayer who purchases and sells securities occasionally but not in such quantities or under such circumstances as to constitute him either a dealer or a trader. (Cf. G. C. M. 9656, C. B. X-2, 127, G. C. M. 9958, C. B. X-2, 158, and article 22 (c)-5 of Regulations 86 for the distinction between a dealer and a trader.

Fundamentally, commissions paid in connection with both purchases and sales of securities, being direct expenses of acquiring and disposing of the property, are direct charges against the profit, or increase the loss, arising from the transaction. The expenses incurred in consummating the purchase and sale necessarily affect the amount of the profit or loss. The position of the Treasury Department, which has been in effect for many years, is expressed by paragraph 108 of Regulations 33, revised, construing the Revenue Act of 1916, which provides that:

> *Expense—Commissions paid.*—Commissions paid in purchasing and selling securities are a part of the cost or selling price of the securities and not otherwise deductible. They do not constitute expense deductions in a return of income.

Article 293 of Regulations 45 reads in part as follows:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities are an offset against the selling price. * * *

The same language appears in article 293 of Regulations 62, article 292 of Regulations 65, article 292 of Regulations 69, and article 282 of Regulations 74. Article 282 of Regulations 77 and article 24-2 of Regulations 86 read in part as follows:

> * * * Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business*

expense, are an offset against the selling price. * * * [Italics supplied.]

The language of all the Revenue Acts from the Revenue Act of 1913 to and including the Revenue Act of 1934 is substantially identical insofar as the provisions affecting the present issue are concerned. It is well settled that where a statute has been construed for a long period of time as having a certain meaning, a reenactment of that statute without change indicates legislative sanction of the construction previously given it. * * *

* * * * *

Since, fundamentally, commissions on both purchases and sales are direct charges to the profit or loss arising from the particular sales in connection with which they are paid, there can be no justification for a departure from that method of treatment except in those cases where the detail of accounting on that basis is so burdensome as to make its use impracticable. No such accounting difficulties exist in the case of any of the three classes of taxpayers enumerated above except the *dealer*. Both the occasional seller and the trader are required to account in their income-tax returns for the profit or loss on each individual sale. The right to inventory securities is denied to the trader and to the occasional seller. (See article 22 (c)–5, Regulations 86.) In so accounting, no difficulty whatever is experienced in adding the purchase commission to the cost of of the security and deducting the sale commission from the selling price thereof. In the case of the dealer, no accounting difficulty is experienced in

adding the purchase commission to the cost and he is required to do so in all cases instead of treating such commissions as current expenses even where he is permitted to inventory his securities. However, in the dealer's accounting there are difficulties which make it impracticable for him to match his selling commissions against each individual sale. The dealer usually buys in large quantities, his sales are numerous and in relatively small amounts, his commissions are often computed and paid on a volume of sales instead of on individual transactions, and where he uses inventories he necessarily departs widely from the principle of accounting for the profit on each individual purchase and sale. The Commissioner has recognized these difficulties and in actual practice has permitted the dealer in securities to treat his selling commissions as "ordinary and necessary business expenses," not because they are technically such but because of practical considerations. However, no formal recognition was given this practice until the promulgation of Regulations 77, when, in article 282, there was inserted the qualifying phrase "when such commissions are not an ordinary and necessary business expense." This language should not be construed as holding that selling commissions are to a trader "ordinary and necessary expenses * * * in carrying on any trade or business" within the meaning of section 23 (a) of the Revenue Act of 1934 and corresponding provisions of prior Revenue Acts.

In reaching this conclusion there has not been overlooked that part of article 23 (a)–1 of Regulations 86, which provides that—

> Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 23 (b)–1 to 23 (q)–1. * * * Among the items included in business expenses are management expenses, commissions, * * *—

or similar articles of earlier regulations. Commissions are paid for many other services beside negotiating purchases and sales of securities. Furthermore, these regulations recognize that the rule stated therein is subject to exception in the class of cases dealt with in this memorandum. Article 23 (a) 1 concludes with this sentence: "As to items not deductible under any provision of section 23, see section 24." The earlier regulations contain similar exceptions.

It is concluded, therefore, that buying commissions are a part of the cost of securities and are not deductible as ordinary and necessary business expenses. Selling commissions are an offset against the sale price and are not deductible as ordinary and necessary business expenses, except in the case of a dealer in securities.

U. S. GOVERNMENT PRINTING OFFICE 1942

SUPREME COURT OF THE UNITED STATES.

Nos. 581 and 582.—October Term, 1941.

Adolph B. Spreckels, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 16, 1942.]

Mr. Justice Black delivered the opinion of the Court.

During 1934 and 1935, the petitioner bought and sold stocks, bonds, and commodities. In connection with the sales, he paid selling commissions to brokers, and in his books these commissions were deducted from selling price before net profit or loss was determined. In his income tax returns for 1934 and 1935, he treated the commissions similarly, not making deductions for them as ordinary and necessary business expenses. In 1939, however, in the course of proceedings before the Board of Tax Appeals,[1] the petitioner asserted that he was entitled to tax refunds for the reason that his failure to make deductions for the commissions had resulted in overpayment in both years. The Board sustained his contention in part, holding that the selling commissions could properly have been deducted as ordinary and necessary business expenses, that the refund claimed for 1935 should be allowed, but that the refund claimed for 1934 was barred by the applicable statute of limitations. 41 B. T. A. 1204. The Circuit Court of Appeals reversed, holding that the claimed deductions for selling commissions were not permissible, and finding it unnecessary therefore to determine whether the refund claim for 1934 was timely. 119 F. 2d 667. Because of a conflict in decisions of Circuit Courts of Appeal,[2] we granted certiorari to consider the question: Are sales commissions paid by a taxpayer engaged in

[1] These proceedings had been initiated in connection with other issues, not relevant here.

[2] With the decision below and Commissioner v. Covington, 120 F. 2d 768 (C. C. A. 5), compare Winmill v. Commissioner, 93 F. 2d 494 (C. C. A. 2), and Neuberger v. Commissioner, 104 F. 2d 649 (C. C. A. 2).

the business of buying and selling securities[3] deductible as ordinary and necessary expenses under Section 23(a) of the Revenue Act of 1934,[4] or are they to be treated as offsets against selling price relevant only to the determination of capital losses or gains?

In *Helvering* v. *Winmill*, 305 U. S. 79, we held that a taxpayer who bought and sold securities could not deduct the commissions paid on his *purchases* as a business expense. Although the *Winmill* case arose under the Revenue Act of 1932, the statutory provisions and regulations there relevant are identical with those again in controversy here. And the conclusion we reached there—that a general regulation[5] designating "commissions" as one of a long list of deductible business expenses is not controlling in the face of a specific regulation pertaining to commissions on securities transactions—is equally applicable here.

The specific regulation pertaining to securities transactions provides:

"Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities, when such commissions are not an ordinary and necessary business expense, are an offset against the selling price. . . ."[6]

If there is any justification for treating sales commissions differently from purchase commissions, it must depend upon the significance of the clause "when such commissions are not an ordinary and necessary business expense." This clause first appeared in Treasury Regulations 77, accompanying the Revenue Act of 1932. In the income tax regulations prior to that time, it was consistently prescribed that commissions paid on purchases and sales of securities were to be treated as part of the cost or

[3] Although the petitioner alleges that some of the commissions were paid on sales of commodities, it does not appear from the record that the petitioner asked for separate treatment of these commissions before either the Board of Tax Appeals or the Circuit Court of Appeals. Nor was such separate treatment requested before this Court.

[4] 48 Stat. 680, 688. The statute provides:

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. . . ."

[5] "Among the items included in business expenses are . . . commissions . . . advertising and other selling expenses . . . ." Article 121 of Treasury Regulations 77, under the Revenue Act of 1932; Article 23(a)-1 of Treasury Regulation 86, under the Revenue Act of 1934.

[6] Article 282 of Treasury Regulations 77, under the Revenue Act of 1932; Article 24-2 of Regulations 86, under the Revenue Act of 1934.

selling price and were not otherwise to be deductible.[7] And in *Helvering* v. *Union Pacific Co.*, 293 U. S. 282, 286, this Court expressly recognized that such commissions have been "consistently treated . . . not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale."

What, then, is the significance of the qualifying clause first appearing in the Regulations of 1932, and what effect is to be given to it? Prior to the formal adoption of the Regulations of 1932, the Commissioner of Internal Revenue permitted one exception to what appears to have been an otherwise uniform practise of treating commissions on the sales of securities as mere offsets against selling price. This exception was made in the case of the dealer in securities, one who "as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom."[8] It reflects the view that there are practical considerations of accounting convenience which make it as difficult for such dealers in many instances to set commissions off against the proceeds of individual sales as it would be for the merchant of other wares to treat his selling expenses only as a series of subtractions from the selling price realized on particular items of his stock.[9] Incorporation of the clause "when such commissions are not an ordinary and necessary business expense" was intended to provide formal recognition for an established business usage, based on the peculiar necessities of securities dealers, a usage to which the Commissioner had already given informal acquiescence.[10] For the casual buyer and seller of securities, or even for the large scale trader on his own account, as here, the practical obstacles to treating sales commissions as offsets against selling price do not exist. In this very case, for example, the taxpayer apparently found it more convenient to follow this method in keeping his own business records.

We therefore conclude that the clause "when such commissions are not an ordinary and necessary business expense" was intended

[7] See, *e. g.*, Article 8, par. 10 of Treasury Regulations 33, Revised, under the Revenue Act of 1916; Article 293 of Treasury Regulations 45, under the Revenue Act of 1918.

[8] See Article 22(c)-5 of Treasury Regulations 86, under the Revenue Act of 1934.

[9] See Bureau of Internal Revenue, G. C. M. 15430, XIV-2 Cum. Bull. 59 (1935).

[10] *Ibid.*

to be and is controlling only in the case of securities dealers.[11] In the case of a trader on his own account where there are no compelling practical grounds for treating sales commissions as such an expense, we find no persuasive reason for distinguishing, under the statute and regulations, between sales commissions like those before us and purchase commissions like those of the *Winmill* case. The judgment of the court below is accordingly

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[11] As the government points out in its brief, a dealer's tax liability under the Revenue Acts of 1932 and 1934 would ordinarily have been the same whether the commissions he paid on sales were treated as deductible business expenses or offsets against selling price. For in general, his gains or losses would not have been capital gains or losses as defined in those acts. See Section 101(c)(8) of the Revenue Act of 1932, 47 Stat. 169, 192; Section 117(b) of the Revenue Act of 1934, 48 Stat. 680, 714.